TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 138.

THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA *EX REL.* THE RAILROAD AND WAREHOUSE COMMISSION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED OCTOBER 9, 1902.

(18,684.)

12166

(18,684.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 138.

THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA *EX REL.* THE RAILROAD AND WAREHOUSE COMMISSION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print.
Petition for writ of error	*a*	1
Writ of error	*c*	2
Citation	*e*	3
Acceptance of service of citation	*f*	3
Assignment of errors in State supreme court	*g*	3
Assignment of errors in Supreme Court of the United States	*i*	5
Bond on writ of error	*l*	7
Transcript from district court	1	8
Petition	1	8
Exhibit A—Findings and order of commissioners	6	11
Order granting writ of mandamus	9	13
Writ of mandamus	10	13
Answer to petition	15	16
Case and bill of exceptions	19	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 18, 1903.

	Original.	Print
Testimony of Frank H. Fisk	20	18
H. M. Martinson	30	24
George H. Emmons	41	30
S. P. Thornby	48	34
Edward Emmerson	51	36
Ernest E. McKain	53	37
William D. Wheeler	56	39
A. P. Tanner	86	55
George H. Emmons (recalled)	92	59
Reporter's certificate	93	59
Consent as to case	93	59
Judge's certificate to case and exceptions	93	59
Order making bill of exceptions part of judgment-roll	93	59
Order making findings and for judgment	94	60
Judgment	98	62
Notice of appeal	101	64
Endorsement on record	103	64
Syllabus	104	64
Opinion	105	65
Judgment	110	66
Order for judgment	112	68
Minute entry of argument	114	69
Clerk's certificate	117	69

a To the Hon. Charles M. Start, chief justice of the supreme court of the State of Minnesota:

Now comes The Minneapolis and St. Louis Railroad Company, a corporation organized and created by and under the laws of the State of Minnesota, by its attorney, Albert E. Clarke, and complains that in the records and proceedings and also in the rendition of a judgment, in a suit between The State of Minnesota, *ex rel.* The Railroad and Warehouse Commission, as plaintiff, and said The Minneapolis and St. Louis Railroad Company, as defendant, in the supreme court of the State of Minnesota, that being the highest court of law, or equity, in said State of Minnesota in which a decision can be had in said suit, and in which a final judgment was rendered against said defendant on the — day of August, 1902, in said suit, wherein it was adjudged that the law enacted by the legislature of the State of Minnesota, embodied in chapter 270, General Laws of 1901, is not violative of the fourteenth amendment to the Constitution of the United States, in that it deprives the defendant of the right to reasonably control, and manage, its own property, compels it to expend its money, and devote its property to the construction and maintenance of a depot and station facilities, not necessary for the reasonable accommodation of the public, and takes its property without its consent, and without compensation or reasonable necessity; by all of which the defendant is deprived of its property without due process of law and is denied the equal protection of the laws; and it was also adjudged by said court in said suit that said statute and chapter *is* not contrary to public policy, unreasonable and void.

It was further adjudged by said court in said suit that chapter 270, Gen. Laws of 1901, is not violative of section 10, article 1, of Constitution of the United States, because it violates and impairs the obligations of the charter contract between the defendant and the State of Minnesota.

It was further adjudged by said court in said suit that section 388, General Statutes of 1894 of said State construed by the trial court as authorizing the establishment of a station at Emmons, as ordered by the Railroad Commission, is not violative of sec-
b tion 10, article 1, of the Constitution of the United States, because it violates and impairs the obligation of the charter contract between the defendant and the State of Minnesota.

It was further adjudged by said court in said suit that section 388, General Statutes of 1894 of said State construed by the trial court as authorizing the establishment of a station at Emmons, as ordered by the Railroad and Warehouse Commission, is not violative of the fourteenth amendment to the Constitution of the United States, in that it deprives the defendant of its property without due process of law, and deprives it of the equal protection of the laws.

All of which appears in the records and pleadings in said suit whereby manifest error has happened to the great damage of said The Minneapolis and St. Louis Railroad Company, defendant in said suit.

Wherefore said The Minneapolis and St. Louis Railroad Company, defendant in said suit, prays for the allowance of a writ of error, and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

ALBERT E. CLARKE,
Attorney for the Minneapolis and St. Louis Railroad Company, Defendant.

Allowed:

CHAS. M. START,
Chief Justice, Supreme Court of Minnesota.

[Endorsed:] Copy. Petition for writ of error. Filed Sep. 15, 1902 Darius F. Reese, clerk.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because that in the records and proceedings and also in the rendition of the judgment of a plea which is in the supreme court of Minnesota, before you or some of you, being the highest court of law or equity in said State in which a decision could be had in the said suit between The State of Minnesota *ex rel.* Railroad and Warehouse Commissioners, as plaintiff, and The Minneapolis and St. Louis Railroad Company defendant, wherein was drawn in question the validity of a statute of the State of Minnesota, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such validity, a manifest error hath happened, to the great damage of the Minneapolis and St. Louis Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, *that*, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 9th day of September, A. D. 1902.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of the Circuit Court of the United States in and for District of Minnesota,
By LOUISE B. TROTT, *Deputy.*

d [Endorsed:] State of —— county of —— U. S. Supreme Court. State of Minnesota, *ex rel.* Railroad & Warehouse Commission def't in error *vs.* The Mnpls. & St. Louis Railroad Co. pl'ff in error. Writ of error.

e UNITED STATES OF AMERICA, *ss:*

To the State of Minnesota *ex rel.* The Railroad and Warehouse Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The Minneapolis and St. Louis Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Chas. M. Start, chief justice of the supreme court of the State of Minnesota, this 9th day of September, A. D. 1902.

CHAS. M. START,
Chief Justice of the Supreme Court, State of Minnesota.

f [Endorsed:] State of —— county of —— — court. State of Minnesota *ex rel.* Railroad & Warehouse Commission def't in error, *vs.* The Minneapolis and St. Louis Railroad Company, pl'ff in error. Citation. Due service of the within by copy is hereby admitted at St. Paul, Minn. this 15th day of September A. D. 1902. W. B. Douglas att'y gen. Attorneys for def't in error Albert E. Clarke, 1104 Guaranty Loan building, Minneapolis, Minn. Attorney for ——.

g *Assignment of Errors Made and Filed by Defendant and Appellant in the State Supreme Court.*

The court erred:

1. In holding that there is any public necessity for the establishment of a station at Emmons, sufficient to justify, or authorize the order of the Railroad and Warehouse Commission.

2. In holding that the order of the Railroad and Warehouse Commission, by which the appellant is required to build and maintain a station at Emmons, is reasonable.

3. In holding that the order of the Railroad and Warehouse Commission is a reasonable exercise of the police power of the State.

4. In holding that a railroad company may be required to establish and maintain stations upon the same railroad, in rural and agricultural districts, within one mile of each other.

5. In holding that chapter 270, Gen. Laws of 1901, is valid, as an exercise of the police power.

6. In holding that chapter 270, Gen. Laws of 1901, is valid, and is not violative of section 13, article 1, of the constitution of the State of Minnesota; which declares that private property shall not be taken for public use without just compensation.

7. In holding that chapter 270, Gen. Laws of 1901, is not violative of the fourteenth amendment to the Constitution of the United States, in this:

It deprives the appellant of the right to reasonably control, and manage, its own property. It compels it to expend its money, and devote its property to the construction and maintenance of a depot and station facilities, not necessary for the reasonable accommodation of the public. It takes its property without its consent, and without compensation or reasonable necessity; by all of which the appellant is deprived of its property without due process of law and is denied the equal protection of the laws.

8. In holding that chapter 270, Gen. Laws of 1901, as applied to the facts in this case, is, not contrary to public policy, unreasonable and void.

9. In holding that chapter 270, Gen. Laws of 1901, is not invalid and void upon its face.

10. In holding that chapter 270, Gen. Laws of 1901, is not violative of section 10, article 1, of the Constitution of the United States, because it violates and impairs the obligation of the charter contract between the appellant and the State of Minnesota.

11. In holding that section 388, Gen. Statutes of 1894, construed by the trial court as authorizing the establishment of a station at Emmons, as ordered by the railroad commission, is not violative of section 10, article 1, of the Constitution of the United States, because it violates and impairs the obligation of the charter contract between the appellant and the State of Minnesota.

12. In holding that section 388, Gen. Statutes of 1894, construed by the trial court as authorizing the establishment of a station at Emmons, as ordered by the Railroad and Warehouse Commission, is not violative of the fourteenth amendment to the Constitution of the United States, in that it deprives the appellant of its property without due process of law, and deprives it of the equal protection of the laws.

STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of the supreme court of the State of Minnesota, do hereby certify that the above and foregoing assignment of errors was made and filed by defendant and appellant in the above entitled proceedings of State of Minnesota, *ex rel.* Railroad and Warehouse Commission, respondent, *v.* The Minneapolis and St. Louis Railroad Company, appellant. Said assignment of errors was filed in said supreme court on the 25th day of April 1902, in accordance with the rules and practice of said court, and became and constituted a part of the record upon which said cause was heard, tried and determined and upon which the same was argued and submitted in said court.

Seal of the Supreme Court, State of Minnesota.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Minnesota, at the capital, St. Paul, Minnesota, this 22nd day of September, A. D. 1902.

D. F. REESE,
Clerk of the Supreme Court, State of Minnesota.

i In the Supreme Court of the United States.

THE STATE OF MINNESOTA *ex Rel.* THE RAILROAD AND WAREHOUSE COMMISSION, Defendant in Error,
vs.
THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, Plaintiff in Error.

Assignment of Errors.

The plaintiff in error respectfully submits, that the supreme court of Minnesota erred in this:

1. In holding that the statute law of the State of Minnesota, embodied in section 388, General Statutes of 1894 and in chapter 270 General Laws of 1901, which authorizes and empowers the Railroad and Warehouse Commission of said State to compel the plaintiff in error to establish and maintain a station upon its line of railroad, without regard to the necessity therefor, or for the necessities of the public, at a point and place already adequately supplied with station facilities, thereby imposing upon plaintiff in error a wholly useless and unnecessary expense, is not violative of the fourteenth amendment to the Constitution of the United States, in this: that by thus compelling plaintiff in error to expend its money and devote its property and earnings to the construction and maintenance of such station, the State of Minnesota, acting through its Railroad and Warehouse Commission takes the property of the plaintiff in error

without its consent; without compensation, or reasonable necessity, whereby the plaintiff in error is deprived of its property without due process of law and is denied the equal protection of the laws.

In holding that the law of the State of Minnesota, embodied in section 388, General Statutes of 1894, and in chapter 270, General Laws of 1901, which authorizes the Railroad and Warehouse Commission of Minnesota to compel the plaintiff in error to construct and maintain a station at Emmons, a small and unimportant village, distant only fifty-six one-hundredths of a mile from an established and *existing station, which existing* station furnishes all needed railroad facilities to the people of Emmons, is a reasonable and valid law; that the action of the State of Minnesota acting under said law through its Railroad and Warehouse Commission is a reasonable and valid exercise of the police power of said State, and that the enforcement of the order of the Railroad and Warehouse Commission, pursuant to said law, is not violative of the fourteenth amendment to the Constitution of the United States, in this: It requires the plaintiff in error to maintain two stations upon its line of railroad within one mile thereby subjecting it to great and unnecessary expense. The business of Emmons is fully accommodated by the station facilities at Norman. The business of the two villages of Emmons and Norman combined being hardly sufficient to justify the maintenance of one station, whereby the property and money of the plaintiff in error is taken without compensation, without public necessity, and without due process of law, and it is deprived of the equal protection of the laws. *j*

3. In holding that said chapter 270 of the General Laws of 1901, is not violative of the fourteenth amendment to the Constitution of the United States in this: Said chapter confers upon the State, acting through its Railroad and Warehouse Commission, the right to compel the establishment of a station at Emmons without regard to the reasonableness of the requirement and without regard to the necessity for such station for the accommodation of the public, or of public interests. Said statute makes no provision for a judicial determination of the questions of necessity or reasonableness and therefore takes the property of the plaintiff in error without due process of law.

4. In holding that chapter 270 General Laws of 1901, is not violative of section 10, article 1, of the Constitution of the United States because it violates and impairs the obligation of the charter contract between the State and the plaintiff in error. This contract includes the right of the plaintiff in error to reasonably control its own property; to select under reasonable limitation, the location of its stations; to be free from compulsory control resulting in the unreasonable and unnecessary dissipation of its earnings in constructing and maintaining facilities and instrumentalities of commerce, not required for the reasonable accommodation of the public needs. *k*

5. In holding that said chapter 270 of the General Laws of 1901 is not contrary to public policy and void.

6. In holding that the enactment and enforcement of said chapter 270 of the General Laws of 1901 is a valid and lawful exercise of the police power of the State.

[Endorsed:] (Copy) Assignments of error. Filed Sep. 15 1902 Darius F. Reese, clerk.

Supreme Court of the United States, *ss:*

Know all men by these presents, that we, The Minneapolis and St. Louis Railroad Company, as principal, and The United Sta es Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto the Railroad and Warehouse Commission in the sum of one thousand ($1,000.00) dollars, to be paid to the said Railroad and Warehouse Commission; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 8th day of September, A. D. 1902.

Whereas the above named The Minneapolis and St. Louis Railroad Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such that if the above named The Minneapolis and St. Louis Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[CORPORATE SEAL.] THE MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY,
By ALBERT E. CLARKE, *General Attorney.*

Attest: JOS. GASKELL, *Secretary.*

In presence of—
C. E. SWAN.
J. J. HARPER.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By C. H. VAN CAMPEN, [SEAL.]
Agent and Attorney in Fact.

C. H. MOORE.
WM. H. MARSH.

STATE OF MINNESOTA, } *ss:*
County of Hennepin, }

On this 8th day of September, 1902, before me, a notary public in and for said county, personally appeared Albert E. Clarke, to me

personally known, who, being by me duly sworn, did say that he is the general attorney of the Minneapolis and St. Louis Railroad Company, and that he executed the foregoing bond for and on behalf of said company, and acknowledged the same to be the free act and deed of said company.

[SEAL.] JOHN J. HARPER,
Notary Public.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

On this 8th day of Sept., 1902 before me, a notary public within and for said county and State, personally appeared C. H. Van Campen, to me personally known, who being by me duly sworn, upon oath did say that he is the agent and attorney in fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of the said company; that the said seal was affixed and the said instrument was executed by authority of its board of directors; and the said C. H. Van Campen, did acknowledge that he executed the said instrument as the free act and deed of said company.

[SEAL.] A. F. BECKER,
Notary Public, Hennepin Co., Minn.

[Endorsed:] Filed Sep. 15 1902 Darius F. Reese, clerk.

1 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1902.

STATE OF MINNESOTA, } ss:
County of Freeborn, }

District Court, Tenth Judicial District.

STATE OF MINNESOTA *ex Rel.* THE RAILROAD AND WAREHOUSE Commissioners, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Defendant.

To the honorable district court of Freeborn county:

The petition of The Railroad and Warehouse Commissioners, by W. B. Douglas, attorney general, respectfully represents:

That Ira B. Mills, J. G. Miller and C. F. Staples are the duly elected, qualified and acting Railroad and Warehouse Com-
2 missioners of the State of Minnesota, and as such constitute the Railroad and Warehouse Commissioners of said State;

that at all times hereinafter stated, A. K. Teisberg was the duly appointed, qualified and acting secretary of said commissioners.

That said Railroad and Warehouse Commissioners have authority, by the laws of this State, to inquire into the management of the business of all common carriers, and whenever, in the judgment of said commissioners, it shall appear that any common carrier fails in any respect or particular to comply with the laws of this State, or whenever, in their judgment, any repairs are necessary upon its railroads, or any addition to or change of its stations or station house is necessary, or any change in the mode of operating its railroad or conducting its business is reasonable or expedient in order to promote the security, convenience and accommodation of the public, said commissioners are empowered and authorized to require the same to be done by said common carrier.

That the Minneapolis & St. Louis Railroad Company, during all the time hereinafter stated, was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota; that as such corporation it has been, during all the time hereinafter stated, and now is, the owner of a certain line of railroad, extending from the city of Minneapolis, in said State, to the southern line thereof, and running through the county of Freeborn, in said State of Minnesota; that during all of said time the

3 said Minneapolis & St. Louis Railroad Company has been, and now is, the owner of and operating and running its trains of cars over said line of railroad, and was, and is, a common carrier for hire of both freight and passengers over its said line of railroad; that during all the times hereinafter stated, the village of Emmons was, and now is, a municipal corporation duly organized and incorporated under and by virtue of the laws of said State, and one of the duly incorporated villages and municipalities of said State; that said village of Emmons is situated and located on the line of defendant's said railroad in the county of Freeborn, in said State of Minnesota.

That at all the times hereinafter stated, defendant's said line of railroad was the only one reaching said village; that the defendant's said railroad has no station facilities whatever at said village of Emmons; that the annual business furnished defendant's said railroad from the village of Emmons is more than twelve thousand dollars ($12,000.00); that it is necessary for the accommodation of the citizens of the village of Emmons and vicinity, and the patrons of said road, and public necessity reasonably requires that said railroad company should build and maintain a depot at said village of Emmons, for the accommodation of the citizens of said village and the patrons of said road.

That there is a suitable location for the station house upon the present right of way of said railroad company, at the point and upon the property described in the order hereinafter more particu-

larly referred to; and that a station house built and main-

4 tained thereon will afford suitable and convenient facilities for the patrons and the people of said village of Emmons.

That the defendant has failed and neglected to build and maintain at said village of Emmons a station house for the convenience and accommodation of the public and for the people of said village of Emmons, and the country tributary thereto, doing business with said railroad company.

That heretofore a large number of citizens of said village of Emmons petitioned the said Railroad and Warehouse Commissioners to require the defendant to build and maintain a station house for the convenience and accommodation of the public and the citizens of the village of Emmons.

That thereafter said commissioners fixed a time and place of hearing, and caused due notice to be given to all parties concerned, of such time and place of hearing; and, pursuant to said notice, said matter came on for hearing on the 2d day of July, A. D. 1901, at the office of the commissioners in the city of St. Paul, Minnesota; and after hearing the evidence of the respective parties, and being fully advised in the premises, the said commissioners, on said 2d day of July, A. D. 1901, duly made an order requiring the said defendant, The Minneapolis & St. Louis Railroad Company, to build and maintain a station house at said village of Emmons, and at the point or place designated in said order, on or before the 1st day of September, A. D. 1901. That a copy of said order is hereto attached and marked Exhibit "A," and made a part of this petition. That said commissioners had authority, and were authorized by
5 the laws of this State, to make said order; and a true copy of said order was duly served upon said defendant on July 8th, A. D. 1901.

That said defendant, The Minneapolis & St. Louis Railroad Company, has failed, neglected and refused to comply with said order of said Railroad and Warehouse Commissioners in all things, and has neglected and refused to build and maintain or furnish a station house for the convenience and accommodation of the citizens of said village of Emmons, and for the public desiring to patronize said railroad; and said defendant still persists and refuses to build or maintain said station house; that there is no plain, speedy and adequate remedy, in the ordinary course of law, by which your petitioner can compel defendant to build or maintain a station house at said village of Emmons, or to compel defendant to comply with said order of said commissioners.

Wherefore, your petitioner prays that a writ of mandamus issue commanding said defendant, The Minneapolis & St. Louis Railroad Company, forthwith to build and maintain a station house at said village of Emmons, for the convenience and accommodation of the public, and of the citizens of said village of Emmons and vicinity; that the same be suitably lighted and heated for the accommodation of the traveling public patronizing said road at said village of Emmons, and that said station house be provided with suitable platforms for the purposes aforesaid; and that the same be thereafter maintained as a regular station house of said railroad company at

said village of Emmons, or show cause before this court, at
6 a time and place specified, why it has not done so, as in duty bound.

And your petitioner will ever pray.

RAILROAD AND WAREHOUSE COMMISSIONERS,
By IRA B. MILLS, *Commissioner.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Ira B. Mills, being duly sworn, deposes and says that he is one of the Railroad and Warehouse Commissioners of the State of Minnesota, and has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

IRA B. MILLS.

Subscribed and sworn to before me this 3d day of October, A. D. 1901.

THOS. YAPP,
[NOTARIAL SEAL.] *Notary Public, Ramsey County.*

EXHIBIT "A."

Findings and Order of Commissioners.

Before the Board of Railroad and Warehouse Commissioners of the State of Minnesota.

In the Matter of the Petition of Certain Citizens of Freeborn County, Minnesota, for an Order Requiring the Minneapolis & St. Louis Railroad Company to Build and Establish a Station at the Village of Emmons.

The above entitled matter came on to be heard at the office
7 of the commission, in the city of St. Paul, Minn., on the 2d day of July, A. D. 1901.

H. H. Dunn and Lafayette French, Esqs., appeared as counsel for the petitioners, and Albert E. Clarke, Esq., appeared as counsel for the respondent, The Minneapolis & St. Louis Railroad Company.

And the commission, having heard the evidence and being fully advised in the premises, we find:

1. That the village of Emmons, in the county of Freeborn and State of Minnesota, is a municipal corporation duly incorporated and organized under the laws of the State of Minnesota; that said village is situated on the line of the Minneapolis & St. Louis railroad, that being the only railroad reaching said village; that said railroad has no station facilities whatever at said village of Emmons; that the annual business furnished said railroad from said village of Emmons is more than twelve thousand dollars ($12,000.00); that

it is necessary, for the accommodation of the citizens of the village of Emmons and vicinity and the patrons of the road, and public necessity reasonably requires that said railroad company should build and maintain a depot at said village for the accommodation of the patrons of said road.

2. That there is a suitable location for a station house upon the present right of way of said railroad company at the point and upon the property hereinafter described, and a station house built and maintained thereon will afford suitable and convenient facilities for the patrons of said road and the people of said village.

8 *It is now, therefore, ordered:* That the said Minneapolis & St. Louis Railroad Company be and it is hereby required to build and maintain a station house for the convenience and accommodation of the public, and the people of Emmons and the country tributary thereto doing business with said railroad company, upon the following described property to-wit: Starting from a point, said point being the section corner between sections thirty-two (32) and thirty-three (33), in township one hundred one (101), north of range numbered twenty-two (22) west, in said Freeborn county, on the south line of said section; thence running north on the section line between sections thirty-two (32) and thirty-three (33) a distance of 650 feet, more or less, to the center line of the railroad of said Minneapolis & St. Louis Railroad Company; thence northeasterly along said center line a distance of 560 feet to a point; thence to the right and at right angles to the chord of the curve of said railroad a distance of 14 feet to a point, said point to be the southwest corner of the station house herein required to be built and maintained; thence left and at right angles to said last course and parallel with said chord a distance of 44 feet; thence to the right and at right angles to said last course a distance of 16 feet; thence to the right and at right angles to said last line a distance of 44 feet; thence at right angles to said last line a distance of 16 feet, to said southwest corner of said required station house.

And it is further ordered: That said station house outside measurements be 16 feet by 44 feet, and of sufficient height to afford

9 a clear space of 10 feet between the ground floor and the ceiling of said station house; and that said station house contain a waiting room, which shall be the width of said building and at least 18 feet long, which waiting room shall be suitably lighted and heated for the accommodation of the traveling public patronizing said road at the village of Emmons.

It is further ordered: That said station house be provided with suitable platforms for the purpose aforesaid, and that the same shall be completed and constructed and open to the public patronizing said road at the village of Emmons, on or before the 1st day of September, A. D. 1901; and that the same shall be thereafter maintained as a regular station house of said company.

Dated July 2, A. D. 1901.

By the commissioners:

A. K. TEISBERG, *Secretary.*

(Title of Cause.)

On reading and filing the petition of the Railroad and Warehouse Commissioners which is duly verified, and on motion of W. B. Douglas, attorney general, H. H. Dunn and Lafayette French, Esqs., attorneys for relator,

It is ordered, That a writ of mandamus issue as prayed for, and the same is hereby made returnable at the court house in the city of Albert Lea, Freeborn county, Minnesota, on the 28th day
10 of October, A. D. 1901, at 9 o'clock in the forenoon of said day.

It is further ordered, That the said writ, petition and this order be served upon the Minneapolis & St. Louis Railroad Company, by the sheriff of said county of Freeborn, by handing to and leaving with any acting freight or ticket agent of said respondent or officer of said company, true and correct copies thereof with all convenient speed.

Dated October 11th, A. D. 1901.

NATHAN KINGSLEY,
District Judge.

Copy of order of Railroad and Warehouse Commissioners attached to findings same as copy attached to petition for writ of mandamus.

(Title of Cause.)

The State of Minnesota to the Minneapolis & St. Louis Railroad Company, Greeting:

Whereas, it manifestly appears to us by the verified petition of the above named relator,

That Ira B. Mills, J. G. Miller and C. F. Staples are the duly elected, qualified and acting Railroad and Warehouse Commissioners of the State of Minnesota, and as such constitute the Railroad and Warehouse Commissioners of said State; that at all times hereinafter stated, A. K. Teisberg was duly appointed, qualified and acting secretary of said commissioners.

11 That said Railroad and Warehouse Commissioners have the authority, by the laws of the State, to inquire into the management of the business of all common carriers, and whenever, in the judgment of said commissioners, it shall appear that any common carrier fails in any respect or particular to comply with the laws of the State, or whenever, in their judgment, any repairs are necessary upon its railroad or any addition to or change in its station or station house is necessary, or any change in its mode of operating its railroad or conducting its business is reasonable or expedient in order to promote the security, convenience and accommodation of the public, said commissioners are empowered and authorized to require the same to be done by said common carrier.

That the Minneapolis & St. Louis Railroad Company, during all

the time hereinafter stated was, and is, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota; that as such corporation it has been, during all the time hereinafter stated, and now is, the owner of a certain line of railroad, extending from the city of Minneapolis, in this State, to the southern line thereof, and running through the county of Freeborn in said State of Minnesota; that during all of said time the said Minneapolis & St. Louis Railroad Company has been, and now is, the owner of and operating and running its trains of cars over said line of railroad, and was, and is, a common carrier for hire of both freight and passengers over its said line of railroad; that during all the time hereinafter stated, the village of Emmons was, and now is, a municipal corporation duly
12 organized and incorporated under and by virtue of the laws of said State, and one of the duly incorporated villages and municipalities of said State; that said village of Emmons is situated and located on the line of defendant's said railroad in the county of Freeborn, in said State of Minnesota.

That at all the time hereinafter stated, defendant's said line of railroad was the only one reaching said village; that the defendant's said railroad has no station facilities whatever, at said village of Emmons; that the annual business furnished defendant's said railroad from the village of Emmons is more than twelve thousand dollars ($12,000.00); that it is necessary for the accommodation of the citizens of the village of Emmons and vicinity and the patrons of said road, and public necessity reasonably requires that said railroad company should build and maintain a depot at said village of Emmons for the accommodation of the citizens of said village and of the patrons of said road.

That there is a suitable location for the station house upon the present right of way of said railroad company at the point and upon the property described in the order hereinafter more particularly referred to; and that a station house built and maintained thereon, will afford suitable and convenient facilities for the patrons and the people of said village of Emmons.

That the defendant has failed and neglected to build and maintain at said village of Emmons, a station house for the convenience and accommodation of the public and for the people of said
13 village of Emmons, and the country tributary thereto doing business with said railroad company.

That heretofore a large number of citizens, of said village of Emmons, petitioned the said Railroad and Warehouse Commissioners to require the defendant to build and maintain a station house for the convenience and accommodation of the public and the citizens of the village of Emmons.

That thereafter said commissioners fixed a time and place of hearing and caused due notice to be given to all parties concerned of such time and place of hearing, and pursuant to said notice said matter came on for hearing on the 2d day of July, A. D. 1901, at the office of the commissioners in the city of St. Paul, Minnesota; and

after hearing the evidence of the respective parties, and being fully advised in the premises, the said commissioners on said 2d day of July, A. D. 1901, duly made an order requiring the said defendant, The Minneapolis & St. Louis Railroad Company, to build and maintain a station house at said village of Emmons, and at a point or place designated in said order, on or before the first day of September, A. D. 1901; that defendant was also required by said order that said station house be provided with suitable platforms for the purpose aforesaid, and that the same be completed and constructed and open to the public patronizing said road at the village of Emmons on or before the first day of September, A. D. 1901; and that the same should be thereafter maintained as a regular station house of said company.

14 That the said commissioners had authority and were authorized by the laws of this State to make said order; and a true copy of said order was duly served upon said defendant on July 8th, A. D. 1901.

That the defendant, The Minneapolis & St. Louis Railroad Company, has failed and neglected and refused to comply with said order of said Railroad and Warehouse Commissioners in all things, and has neglected and refused to build and maintain or furnish a station house for the convenience and accommodation of the citizens of said village of Emmons, and for the public desiring to patronize said railroad, and said defendant still persists and refuses to build and maintain said station house.

Now, therefore, we being willing that free and speedy justice be done in this behalf to them, the said Railroad and Warehouse Commissioners do therefore command you that immediately after the receipt of this writ, you build and maintain a station house at the village of Emmons for the convenience and accommodation of the public and the citizens of said village of Emmons, and that the same be suitably lighted and heated for the accommodation of the traveling public patronizing said road at the village of Emmons; and that said station house be provided with suitable platforms for the purposes aforesaid; and that the same be thereafter maintained as a regular station house of said railroad company at said village of Emmons, or that you show cause to the contrary thereof before this court at the court house in the city of Albert Lea, in said county of Freeborn, before the Hon. Nathan Kingsley, judge of said

15 district court, on the 28th day of October, A. D. 1901, at 9 o'clock in the forenoon, why you have not done so; and that you then and there make your return to this court with your certificate on such of having done as you are herein commanded.

Witnesseth, the Hon. Nathan Kingsley, judge of the district court of the tenth judicial district of the State of Minnesota, at Albert Lea, in the county of Freeborn and the State of Minnesota, this 15th day of October, A. D. 1901.

[SEAL.]

A. S. HAYES,
Clerk of said District Court.

(Title of Cause.)

For its answer to the petition for an alternative writ of mandamus in the above entitled cause, and for its return to said writ, The Minneapolis & St. Louis Railroad Company, the respondent above named, says:

1 It admits that Ira B. Mills, J. B. Miller and C. F. Staples are the duly elected, qualified and acting Railroad and Warehouse Commissioners of the State of Minnesota, and that A. K. Teisberg was the secretary of said commissioners, as stated in said petition and writ.

2. It admits that this respondent is a railroad corporation of this State, owning and operating a line of railroad as stated in said petition and writ; and that it is, and was, at all the times re-
16 ferred to therein, a common carrier of goods and passengers for hire. That said railroad extends from the city of Minneapolis to the south line of the State of Minnesota, as stated in said petition, and thence still southerly to Angus, in the county of Boone, State of Iowa.

3. As to the allegation that heretofore a large number of citizens of said village of Emmons petitioned the said Railroad and Warehouse Commissioners to require the respondent to build and maintain a station house for the convenience and accommodation of the public, and the citizens of the village of Emmons, this respondent has neither knowledge nor information sufficient to form a belief.

4. It admits that on the 2d day of July, 1901, said commissioners made an order requiring the said respondent to build and maintain a station house at said village of Emmons; and that a copy of said order is attached to the petition for an alternative writ of mandamus, and is identified as Exhibit "A."

5. The respondent denies that said commissioners had any right, authority or jurisdiction to make said order, or to institute or prosecute this proceeding.

6. It admits that a copy of said order was served upon the respondent, and that it has failed, neglected and refused to comply therewith.

7. The respondent denies the allegation in said petition that Emmons is without station facilities; denies that public necessity requires the construction of a station and depot at Emmons
17 for the accommodation of the citizens of said village, and the patrons of said railroad.

8. As to whether said village is incorporated, this respondent has neither knowledge nor information sufficient to form a belief.

9. For further answer and return, this respondent says: The site of the proposed station, as designated by the order of said commissioners, is a point upon respondent's line of railroad between the station of Twin Lakes, Minnesota, and the station of Norman, Iowa, both of which said stations were established many years since, and have been maintained and operated continually for many years last past; and this respondent has at both of said stations, adequate

facilities for transacting business with the public. Such facilities include station grounds, trackage, and freight and passenger stations. The distance between Twin Lakes and Norman (the next station south) is 6¼ miles. The town of Lake Mills, which is also a station upon said railroad, and which is also supplied with adequate facilities for transacting business with the public, including the necessary depot, station grounds, yards, etc., is 5¼ miles south of Norman; and the three existing stations named, viz: Twin Lakes, Norman, and Lake Mills, are situated upon a section of respondent's railway less than 12¼ miles in length. The location of the proposed station at Norman, which last named station is, and has been, at all times, accessible to the petitioners, and to all citizens of Emmons, *and* affords them ample railroad facilities. The station at Norman was
18 erected, operated and maintained many years before any buildings, business houses or industries were located at Emmons, and for many years before the village of Emmons had any existence. The necessities of the community at and adjacent to Emmons are now fully supplied and met by the station at Norman, which is convenient and accessible.

10. The respondent further says that at the time its predecessor in interest constructed its said railroad it entered into a contract with the citizens of Norway township, Winnebago county, Iowa, and with the citizens of said Winnebago county (that being the township and county in which the station of Norman is located), to establish and maintain a station in said Winnebago county within one mile of the northeast corner of said county. The consideration for such contract was a vote of five per cent. tax upon the assessed valuation of the taxable property of said township, in aid of the construction of said railroad. Said Norman station was located and established, and has ever since been maintained in pursuance of said contract; and this respondent is, by the terms thereof, obligated to continue to maintain the same.

11. This respondent says further, that chapter 270, General Laws 1901, approved April 13, 1901, which was enacted by the legislature of said State at its thirty-second session, which arbit-arily requires railroad carriers to provide freight and passenger rooms and depots at all villages and boroughs upon their respective roads, without regard to the necessity therefor and without regard to the
19 location or situation of such village or boroughs, or to existing conditions, is unjust, unreasonable, contrary to public policy and void.

It denies to the respondent the right to reasonably manage or control its own business; it takes its property without its consent.

It takes the property of this respondent arbitrarily and unnecessarily, for public use, without just compensation, and is, therefore, violative of the fifth amendment to the Constitution of the United States.

It deprives the respondent of its property without due process of law, and denies it the equal protection of the laws and thus violates the fourteenth amendment to the Constitution of the United States.

Wherefore, the respondent prays that the prayer of the petitioners be denied; that the alternative writ of mandamus be quashed and that respondent go hence with costs.

ALBERT E. CLARKE,
Attorney for Respondent, 1104 *Guaranty Loan Bldg., Minneapolis, Minn.*

Duly verified.

(Title of Cause.)

This cause came on for trial at the general term of the district court in and for said county, on Wednesday, the 4th day of December, 1901, before the Hon. James H. Quinn, judge of the seventeenth judicial district, acting for the Hon. Nathan Kingsley, judge of the tenth judicial district.

W. B. Douglas, attorney general, Lafayette French, Esq., and H. H. Dunn, Esq., attorneys of record for relators, Lafayette French, Esq., appearing in court in behalf of the relators, and Albert E. Clarke, Esq., and H. C. Carlson, Esq., appearing as attorneys in behalf of the respondent.

Case was opened to the court on the part of the relators by Mr. French.

Respondent admits that the village of Emmons is incorporated, as alleged in the petition.

It is admitted that the station at Norman was erected, operated and maintained many years before any buildings, business houses or industries were erected at Emmons.

It is admitted, subject to the objection of relators as to immateriality, irrelevancy and incompetency, that the Minneapolis & St. Louis Railroad Company made a contract with the village of Emmons, when it was called the Minneapolis & St. Louis Railway Company, to establish and maintain a station within a mile of the northeast corner and within Winnebago county.

FRANK H. FISK, called on the part of the relators, and being duly sworn, testified as follows:

Examination in chief.

By Mr. FRENCH:

Q. Where do you reside?
A. Albert Lea.
Q. How long have you resided here?
A. I have resided in Albert Lea and vicinity, that is, I have made my home here, really, since 1878.
Q. What is your business, Mr. Fisk?
A. I am surveyor and civil engineer.
Q. Do you hold any official position at this time?
A. I am county surveyor.

Q. How long have you been engaged in surveying, and as civil engineer?

A. About twenty-five years.

Q. Do you know where the village of Emmons is situated?

A. Yes, sir.

Q. Have you recently made a plat or map of the village, and the country immediately adjacent to it?

A. I have.

Q. (Showing witness plat marked Exhibit "1.") I show you Exhibit "1," and ask you to state if that is the map or plat which you prepared?

A. It is.

Q. What do these red lines upon this plat indicate?

A. They indicate the roads.

Q. The public highways?

A. Public highways.

Q. What is indicated by the green lines you have on this map?

A. The incorporation of the village of Emmons, or what is included in the village of Emmons.

Q. What does this public highway, running east and west, south of Emmons, represent?

22 A. That running on the south line of the village of Emmons—that is a line along the State line, between the State of Minnesota and the State of Iowa.

Q. Do you show, upon that map, the line of the Minneapolis & St. Louis railroad?

A. I did, as it runs from the station of Norman—as it runs north through the village of Emmons.

Q. Have you that marked as "railroad" upon that map?

A. I have; yes, sir.

Q. Can you point out where the center of the incorporation of the village is?

A. Well, the center of incorporation is very nearly that point (indicating.)

Q. The geographical center?

A. Yes, sir.

Q. How is it marked?

A. Marked with a black star.

Q. Is it indicated as the center upon the map?

A. Yes, sir.

Q. What do these that look like buildings here, represent?

A. They represent the business blocks that are built up nearly solid, with stores and buildings, in the village of Emmons.

Q. What does this represent here, north of those business blocks?

A. This point here represents the school house in the village, and this point here is the location of the mill in the village, and this is the location of the bank, and the hotel located there, and this

23 line of blocks are built up with store buildings, business blocks.

Q. What is this north of those business blocks?

A. That is a piece of property belonging to H. H. Emmons; that is, property lying in that direction has been laid off in acre lots—laid off in residence property.

Q. You have here upon this plat some highways, running north and south, from the south line of the State?

A. This highway marked here (indicating) is a highway that runs down upon the county line between Worth county and Winnebago county; Worth county on the east and Winnebago county on the west. This line (indicating) running down Worth county, and these lines represented here (indicating) are highways located in sections 7, 8, 17 and 18, of Worth county, and 12 and 13 of Winnebago county, Iowa.

Q. Do they represent all the highways in those sections?

A. They do; yes, sir, that pass through those sections.

By Mr. CLARKE:

Q. The highways are colored red?

A. Yes, sir.

By Mr. FRENCH:

Q. You have here upon the plat, near the State line, a stream?

A. Yes, sir.

Q. What does that indicate? What is it, a creek or river?

24 A. It is the outlet, going through here (indicating) from State Line lake, and also the overflow from Bright's lake, Winnebago county.

Q. What do these little dots indicate, here south of the State line?

A. They indicate a low marshy ground that runs through there; low, sloughy, marshy ground surrounding that lake, and comes out here, in connection with Bear lake, which is located further off here (indicating).

Q. Have you the Norman station located on that plat?

A. I have; yes, sir.

Q. Where is that?

A. Located here (indicating).

Q. Is that marked Norman station upon the plat?

A. It is.

Q. Now, Mr. Fisk, is this plat, or map here, substantially correct?

A. It is.

Q. In regard to the character of the ground, and streets and highways, and the location of Norman and Emmons?

A. Yes, sir.

Q. And these lakes, Bright's lake and State Line lake?

A. Yes, sir.

Q. And this creek, or stream?

A. Yes, sir.

Q. Are there any other highways covered by the territory represented on this plat or map, other than you have indicated there by red lines?

25 A. No, sir; I think not, unless it may be a private park way, or something like that, coming in.

Q. Well, I mean public highways?

A. Yes.

Q. Can you tell us how far it is from the *the* south line of Emmons by the public highway—by any public highway to Norman station?

A. It is about—it is five thousand forty-five feet, or a very little less than a mile. Five thousand two hundred eighty feet make a mile—about ninety-five one hundredths of a mile.

Q. In going to Emmons, which direction do you go to get there, which highway do you take?

A. Take the State Line road out to the county road, that would be west.

By Mr. CLARKE:

Q. County road between what counties?

A. On the line as we start from the village of Emmons, at this point here, the south line of the village, we would go on the State line between Freeborn county and Worth county—this point here—go westerly to the county line between Worth and Winnebago county, and go south on the county line down this way, and west to the depot (indicating on map).

By Mr. FRENCH:

Q. How far is it from Norman station to the school house?

A. It is six thousand four hundred forty-two feet.

By Mr. CLARKE:

Q. By the traveled road?

26 A. By the traveled road. Or, it is a little more than a mile, about a mile and a fifth.

By Mr. FRENCH:

Q. If you go west to the county line between Winnebago and Worth counties, where you turn and go south to go to Norman, what is the condition of the country there, leading from the State line down east to the railroad track?

A. It is a great deal of quite low country, the road is very poor most times of the year, going through that country. The road is muddy, low and marshy; very poor.

Q. Are there any sidewalks along this highway here (indicating)?

A. No, sir.

Q. To the village of Emmons?

A. No, sir.

Q. Is there any other way for the people to go to Norman station without trespassing, except to go on this public highway?

A. No, sir.

Q. Now, going back to the country between the south line of the

State, down as far as the railroad track, on the line running to Norman station, what is there, a turnpike road thrown up there?

A. It is turnpiked to some extent. There has some work been done on it, but there hasn't been very much work; that is, the work is of very poor character that has been done upon the road.

Q. How is the road and topography of the country there, as to being wet? Does water stand there?

A. It is wet most seasons of the year.

27 Q. Do you know anything about the country in and about Emmons here, on the west, we will say—as to whether that is settled up?

A. Well, it is quite well settled, yes, sir.

Q. How is it at the north?

A. It is well settled.

Q. How is it as to the east here, this State Line lake, both in Minnesota and down here in Iowa, just south of the line?

Q. The land is all settled. There is farm houses.

Q. People living east here—south of the State line in Iowa, and east of the State Line lake in Minnesota—if they wanted to go to Norman, what road would they be compelled to take?

A. They would have to go in on the State line road, over this road (indicating) to Norman, or they would be obliged—the only other way they could get there would be by going a mile and a half south of the village of Norman, and coming up along this line here (indicating).

Q. Then going north?

A. Going north to Norman.

Q. What do these buildings in here indicate (indicating)?

A. They represent blocks.

Q. Where are the residences located? Have you indicated where the residences are on this map?

A. No, sir; on account of the scale of the map I didn't mark them. There was so many buildings, and would go in such a small scale, I have not marked only one or two buildings, but up and down this street (indicating), clear up to this point (indicating) above

28 here, is nearly all filled up with residences.

By the COURT:

Q. That is to the east of the highway, running north?

A. Yes, business blocks and residences, both east and west, running along here (indicating) and here (indicating); this section and this section (indicating); up to the school house and north of the school house.

By Mr. FRENCH:

Q. How is it as to being settled northwest of the business blocks, this highway running north and south?

A. Those residences there are mostly farm residences, after we get above that line.

Q. I mean in this vicinity (indicating)?

A. As I said, that place is taken up with residences from this line (indicating) down to this (indicating); half a mile north and south of here.

Q. How far would it be from the south line up to the mill, or the crossing of the railroad track?

By Mr. CLARKE: From the south line of the State?

By Mr. FRENCH: Yes.

A. From the south line up to this point here (indicating), this is half a mile up to this point.

Q. What point is that?

A. At this line—this is the center line.

29 By Mr. CLARKE:

Q. The northwest corner of the Emmons block?

A. The northwest quarter of H. H. Emmons' property there.

By Mr. FRENCH:

Q. How far is it from the south line to the *the* school house?

A. It is thirteen hundred and ninety-seven feet, or a little more than a quarter of a mile.

Q. To the school house?

A. To the school house, from the south line.

Q. Does the company's road, as shown here upon this plat, run there in the manner in which you have indicated there?

A. Very closely. It is not made exactly, but as near as I could draft it from their plat that they have filed in the auditor's office, taken from that. There may be a little error, but very trifling in the general location of it.

Map offered in evidence and received without objection.

Cross examination.

By Mr. CLARKE:

Q. The country about Emmons is an agricultural or farming country entirely, is it not?

A. Outside of the village, yes, sir.

Q. All territory outside of the building portion, which is tributary to Emmons, is a farming or agricultural country?

A. Yes, sir.

30 Q. Do you know how many dwelling houses there are in the village of Emmons?

A. No, sir; I don't think I can give it exact.

Q. About two dozen, or twenty-four, are there not?

A. In my judgment there are quite a number more than that.

Q. Have you counted them?

A. I have—that is, I have been doing a great deal of work in that vicinity, and my judgment——

Q. Have you counted them to know how many there are?

A. No, sir; I have not counted them.

By Mr. CLARKE: I shall not attempt to contradict this testimony as to the correctness of the plat and locations, and things of that kind.

H. M. MARTINSON, called on the part of the relators, and being duly sworn, testified as follows:

Examination in chief.

By Mr. FRENCH:

Q. Mr. Martinson, where do you live?
A. Emmons.
Q. How long have you lived there?
A. I have lived there a year and a half.
Q. What is your business?
A. I am cashier of the Emmons bank.
Q. Can you tell us how many business houses there are in Emmons?
A. How many?
Q. Just name them.
31 A. Well, I would start in with the photograph gallery and lumber yard, flour mill, restaurant, meat market, wagon shop, and at this wagon shop they are also selling machinery; hotel, furniture store, restaurant, jewelry store, hardware store and grocery store.
Q. More than one hardware store?
A. Yes; I am naming them on one side of the street.
Q. Well, just name them; when you get to the hardware store, name the whole number.
A. Grocery store and general store.
Q. How many general stores are there, more than one?
A. There are four general stores, blacksmith shop, livery barn——
Q. More than one blacksmith shop?
A. Yes, there are two; I stated two hardware stores, drug store, bank, saloon, printing office, one barber shop, grain elevator, coal and wood dealer there.
Q. Coal and wood yard?
A. Coal and wood yard, yes, sir; and also two dray lines there. I think that is all.
Q. Have you got a bank?
A. Yes, sir.

By the COURT:

Q. Do the two dray lines haul all the goods from Norman?
A. Yes.

By Mr. FRENCH:

Q. You say you are cashier of that bank?

32 A. Yes, sir.
Q. What are the amounts of your deposits there, yearly?
A. Our deposits are now about six thousand dollars, I think.
Q. What would be your average, say for the last year?
A. O, they would average, say sixty thousand dollars.
Q. What is the character of the country in and about Emmons as to its being settled, or otherwise?
A. It is very well settled.
Q. How?
A. The country surrounding Emmons is very well settled.
Q. What is it, an agricultural country?
A. Yes.
Q. You only have one railroad there, going through Emmons?
A. Yes, sir; one railroad.
Q. That is the Minneapolis & St. Louis railroad?
A. Yes.
Q. You have no station facilities there?

It is admitted they have no station facilities, but spur tracks.

Q. No trains stop there on the Minneapolis & St. Louis road for passengers?
A. They do not.
Q. Where is your nearest station when you take passage on the railroad?
A. Norman, Iowa.
33 Q. In going to Norman, what road do you take, or are *are* you obliged to take; are there more than one road going there?
A. No, sir.
Q. What road is that, Mr. Martinson?
A. That is a public road.
Q. Well, you say public road; which way does that road run, briefly?
A. Taking the road west from Emmons and south.
Q. Going west, do you go on the State line road?
A. Yes, west on the State line, and then south.
Q. Did you hear Mr. Fisk's testimony here?
A. Yes, sir.
Q. And his reference to the road they take?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.
Q. Do you know anything about the condition of the road between the State line here, say, and Norman?
A. Yes, sir.
Q. How is it during the year?
A. In the spring of the year it is very bad, also in the fall. At different times it is quite bad.
Q. Is that true when you have storms or rain?
A. Yes, sir; snow storms.

Q. What is the character of the land or country there?
A. Very good.
Q. I mean where the road runs?
A. It is poor land, swampy, low land.
34 Q. Are you familiar over at Norman?
A. Yes, sir.
Q. What is the character of the station there on the defendant's line of road. Have they a station house there?
A. Yes.
Q. How many waiting rooms have they?
A. One.
Q. Do you know what time that station is kept open?

Objected to on the ground that it is incompetent and immaterial. If the station at Norman isn't kept open at proper hours, there are ways to reach that.
Objection overruled and exception noted.

Q. Go right on and tell about that, if you know.
A. Well, I have seen a notice posted to the effect that it is closed at 6 o'clock, or will be closed at 6 o'clock in the afternoon.

By the COURT: That answer may be stricken out.

Q. How many passenger trains are run? Do you know how many passenger trains are run through Norman?
A. Two each way, daily.
Q. Two each way?
A. Two passenger trains each way, daily.
Q. Where is the county seat of you people that live down there at Emmons?
A. Albert Lea.
Q. How far is that from Emmons?
A. Thirteen miles.
35 Q. By rail?
A. By rail, thirteen miles.
Q. Is there any other road except the Minneapolis & St. Louis by which you can reach the county seat?
A. No, sir, no railroad.
Q. That is what I mean. We are talking about railroads now.
A. Yes, sir.
Q. What time—desiring to go to Albert Lea, or to go north, what time can you take trains out of Norman?
A. Well, you can take a train in the afternoon.
Q. What time in the afternoon?
A. About 2.15, I think or thereabout, and you can take a train in the morning at 3, I think, something about 3 o'clock in the morning.
Q. What time do the trains going south or if you should return from Albert Lea, or from the north, what time would you arrive at Norman?

A. I would either get there at about 2 o'clock or else at 1 o'clock at night.
Q. Two o'clock, what time?
A. Two o'clock in the afternoon or else 1 o'clock at night.
Q. Do you know what facilities the company has there for taking the night train, whether the station is open or not?
A. No, it is not open.
Q. What do you do when you desire to take passage on the train?
A. In the night?
Q. Yes, when you get in there in the evening?
36 A. Well, if I desire to take the midnight train, or 1 o'clock train, I would take a lantern with me and wait until the train came and then flag it by swinging the lantern.
Q. Does a train stop unless it is flagged?
A. No, I think not.

By the COURT: Is this Norman?

By Mr. FRENCH:

Q. Yes. That is the only place you can take a train, as I understand?
A. Yes.
Q. Is there any hotel at Norman?
A. I think there is a hotel there now, some small concern, doesn't amount to anything.
Q. Have you taken a train there in the morning?
A. At Norman?
Q. Yes.
A. Yes, sir.
Q. Many times?
A. No.
Q. How many times?
A. O, I think I have taken it five or six times since I came to Emmons.
Q. Within a year and a half?
A. Yes, sir.
Q. Do you know whether the station is open?
A. It has never been open at that hour of the morning while I have been there.
Q. Where did you stay after you arrived there, until the train came?
37 A. Stayed on the platform.
Q. Are there station grounds there, lighted at night?
A. No, sir.
Q. How is it when you come in there, at 12 or 1 o'clock in the evening when you return from the north. Is the station house open?
A. No, sir.
Q. Any lights there on the station grounds?
A. No, sir.

Q. Now, in going to Norman and returning from Norman, if you take the train in the morning, or come in there in the evening, do you have to go over this public highway that you have described, in going to Emmons?

A. Yes, unless I walk on the railroad track.

Q. You have no business to walk on there; I mean, is there any way provided for the public, or for you?

A. No, sir.

Q. That is the only way?

A. Yes, sir.

Q. Are there any lights between Norman and Emmons?

A. No, sir.

Q. Nothing of that sort?

A. No, sir.

Q. Now is the condition of affairs there at Norman such as you have described? Is that true at all seasons of the year?

A. Yes, sir.

Q. As to the station being closed at night, and not lighted?

A. Yes, sir, it is true.

38 Q. How large a place is Norman? Do you know about how many people they have there?

A. I was counting them up in my head yesterday morning, I counted fifty-four that were actually living there. There might be more or might be less.

By the COURT:

Q. Fifty-four families?

A. Fifty-four people.

By Mr. FRENCH:

Q. You counted children and all?

A. Counted children and all.

Q. How large a place is it? How many business houses have they? What is there there?

A. Norman?

Q. Yes.

A. There is a general store there.

Q. How is it? A very large or small institution?

A. It is a fair general store. There is a small hardware store, there is a small grocery store there, a grain elevator and a lumber yard.

Q. How large is this elevator?

A. It is a very small affair.

Q. Are there any hotels there to accommodate people when you come in here at 1 o'clock at night, or in the morning, where you can go and sit and wait for the train?

A. I don't know for certain, I don't think there is. I am not familiar with them.

Q. You say that this road between Norman and Emmons there, is bad *at times.*

39 A. Yes, sir.
Q. What do you mean by that?
A. Well, I mean that in the spring of the year it is almost impassable *for a few days.*
Q. For teams?
A. It is hard to get through there with a team.
Q. Well, has that condition existed at any time since you have been there?
A. Yes, sir.
Q. Do you know of it being so teams could not get through?
A. Yes, sir. I have heard tell of it.
Q. I don't want you to tell what you heard, but anything you know.

Cross examination.

By Mr. CLARKE:

Q. These two dray lines that you speak of, what do you mean by dray lines; How many teams and drays are included in this line?
A. Well, I own one of the dray lines myself, I have had three men working for me all summer, and six horses part of the time.
Q. How many teams, three?
A. Yes, sir.
Q. How many in the other?
A. I think they are using two teams and two men.
Q. That would be five teams altogether?
A. Yes, sir.
Q. All on duty at the same time?
A. Yes, sir.
Q. Five teams?
40 A. Yes, sir.
Q. How large is this bank building?
A. How large is it?
Q. Yes. This bank in which you are cashier.
A. We have deposits of about sixty-five thousand dollars.
Q. I am talking about the building now.
A. I think the building is about twenty-two by thirty.
Q. The mill is a pretty small building, isn't it?
A. It is a pretty good sized mill.
Q. What do you call good sized? How large is it?
A. It is called a sixty-five barrel mill.
Q. I mean about the size of the building?
A. The mill, as to size?
Q. Yes.
A. I should judge it was about forty or fifty feet, three stories high.
Q. Do you know anything about the capacity of it, yourself?
A. Only what I have heard.
Q. Do you know how many rolls?
A. No, I don't know as to that.

Q. There are two local freight trains also, on the Minneapolis & St. Louis, are there not?
A. Yes, sir.
Q. They carry passengers, don't they?
A. Yes.

Re-direct examination.

By Mr. FRENCH:

Q. Do they stop at Emmons or let off passengers?

41 It is conceded that there is no station building at Emmons and none of respondent's trains stop at Emmons, either to take on or discharge passengers.

GEORGE H. EMMONS, called on the part of the relators, and being duly sworn, testified as follows:

Examination in chief.

By Mr. FRENCH:

Q. Mr. Emmons, where do you reside?
A. Emmons.
Q. How long have you resided there?
A. I have resided there forty-five years, except two years.
Q. You have been there about forty years?
A. Yes, sir.
Q. Are you familiar with the country in and about Emmons?
A. Yes, sir.
Q. You know about how many people they have, what the population of Emmons is.
A. Yes.
Q. What is your population. I mean, in the corporate limits?
A. Two hundred forty six, I believe.
Q. Do you know how many business houses they have?
A. Yes.
Q. What have you there?
A. Four general stores, two large hardware stores, one drug store, one shoe store, two agriculture implement building-, one furniture store, one saloon, one printing office, one barber shop, one
42 jewelry shop, two restaurants, one hotel, one bank, one lumber yard, two blacksmith shops, two wagon shops, two livery and feed barns, two dray lines, one flour mill, one photograph gallery, a harness shop, grain elevator, two coal yards, one doctor, a large creamery, village hall, cold storage, just about now completed; and a large school house.
Q. Have you a hotel there?
A. Yes, sir; and a lodge hall.
Q. How is the country, west and north and east of Emmons, with reference to being well settled?

A. It is well settled.
Q. That is an agricultural country, isn't it Mr. Emmons?
A. Yes, sir.
Q. Do you know about what the freight receipts are, incoming and outgoing, at the village of Emmons, a year?

By Mr. CLARKE: I shall prove exactly what they are and it does not seem to me that witness has shown himself competent to testify.
By the COURT: I think the witness has not shown himself qualified. If the proof is not satisfactory I will allow you to rebut it.

Q. Did you hear Prof. Fisk describe the highway leading from Emmons over to Norman?
A. Yes, sir.
43 Q. Are you familiar with the conditions of the road and country, after you turn to leave the State line and go south toward Norman?

By Mr. CLARKE: I shall not undertake to contradict any of that evidence. I will let the testimony of your witnesses already given stand just as it is. There is no dispute about it.

Q. Do you know what facilities and conveniences there are at Norman, with reference to passengers that desire to take the train there on the Minneapolis & St. Louis road?
A. Yes.
Q. Is that the only railroad there?
A. Yes, sir.
Q. Are you familiar with the arriving time and the leaving time of the passenger trains?
A. Yes, sir; I think so.
Q. How many trains do they run there—passenger trains—a day?
A. Two a day.
Q. What time do the trains leave Norman going north, going to Albert Lea, or Minneapolis or St. Paul?
A. It is a little after 2 in the afternoon, and about 3, or a little after 3, in the morning.

By Mr. CLARKE: I shall not contradict that, either.

By Mr. FRENCH:

Q. What time do they arrive?
A. It is a little before 2 in the afternoon and about 1 o'clock at night.
44 Q. Do you know whether the station is kept open in the evening or not?
A. It is not. I don't think it is.
Q. In the evening?
A. In the evening, you say?
Q. Yes, in the evening.
A. I have not been there in the evening for some time; I can't say.

Q. Have you within the last year taken passage on the midnight train?

A. Yes.

Q. That train leaves about 3 o'clock in the morning, you say?

A. Yes, sir.

Q. Was the station open?

A. No, sir.

Q. Does that train stop there unless it is flagged?

A. No, sir.

Q. Well, now, how do you stop the train?

A. Well, sir, we generally take a lantern and swing back and forth, and flag them.

Q. You stop the train by means of swinging a lantern?

A. Yes.

Q. That is the way you take passage?

A. Yes, sir.

Q. What facilities have you while waiting for the train?

A. We stand out on the platform.

Q. Is that true all seasons of the year?

A. Yes, sir.

Q. Now, when you come in, if you come from the north,
45 and come in there at 1 or 12 o'clock, whatever time that train gets there in the night time, is the station house open?

A. No.

Q. Have they any hotel there at Norman?

A. Not that I know of.

Q. You have lived right there for forty years; can you tell us briefly what they have at Norman, what places of business?

A. Well, they have one general store, and a small hardware store—I think they have a small hardware store; a grain elevator, a lumber yard, creamery and a number of vacant buildings there.

Q. About how many vacant buildings—are those business buildings that are vacant?

A. Yes, sir; some of them.

Q. About how many people have they over there, do you know?

A. I can't say.

Q. Do you know the number of residences there are at Emmons?

A. No, I don't know the number of houses—the population.

Q. No-, do you know how many residences there are at Emmons?

A. No, I do not.

Q. Can you state approximately?

A. Yes, sir, I think so; about thirty or thirty-five.

Q. Where are those residences with reference to the State line mostly and chiefly; where are they located?

A. They are all north of the State line.

Q. Well, now, north of the State line here (indicating),
46 begin the business blocks, as indicated on this map; is that right?

A. Yes, sir.

Q. You have seen this map?

A. Yes, sir.
Q. Is it substantially correct?
A. I think so.
Q. So the business houses run north?
A. Yes, sir.
Q. Where are the residences, point out on the map where they are chiefly located?
A. There is some in north of the railroad track and some east.
Q. They wouldn't be right among those business blocks, would they; outside of there, where would they be?
A. This is business blocks here (indicating).
Q. Where are the residences where people live?
A. Up this way.
Q. Would that be north of the business blocks?
A. Yes, sir.
Q. North and east?
A. North and east.
Q. How do people living east and southeast of Emmons, in Minnesota and Iowa, get to Norman—what road?
A. They go on the State Line road.
Q. Then they go right through?
A. West.
Q. On the south side of Emmons?
A. Yes, sir.
Q. In order to get through?
47 A. Yes, sir.
Q. Is there any other public highway by which they can get to Norman?
A. No, not in there.
Q. How is that country with reference to being settled up?
A. It is all settled up.
Q. Land under cultivation?
A. Yes, sir,
Q. Farm houses?
A. Yes, sir.
Q. What is the character of the land lying south of the State line where the road running to Norman is; how is it?
A. Most of it is low, marshy land.
Q. Do you know what the condition of the road is there during the season?
A. Yes.
Q. Well, what is it?
A. Well, during wet and stormy weather it is in poor condition.
Q. What do you mean by poor condition; is it passable or impassable?
A. It is almost impassable; it is too soft.
Q. Do you know of its being within the last year impassable?
A. Yes.
Q. When was that?
A. Last spring.

Q. For how long a time did that exist?
A. O, I don't know; I think it was about a month.
Q. It was in that condition?
A. Yes.

48 Q. Something has been said by Mr. Martinson about these dray lines taking their goods from Norman; that is, carting them over to Emmons. Are there any private conveyances for goods and merchandise, are there other conveyances to take their goods—do some people cart over their own goods? I ask for information.
A. No, I don't think there is.
Q. What does it cost you to cart your goods from Norman over to Emmons?
A. Five cents a hundred.
Q. Is that the general charge?
A. Yes, sir.

S. B. THORNBY, called on the part of the relators and being duly sworn, testified as follows:

Examination in chief.

By Mr. FRENCH:

Q. Mr. Thornby, where do you live?
A. Emmons, Minn.
Q. How long have you lived there?
A. I have been in business there thirteen years.
Q. What is your business there?
A. General merchandise.
Q. You are familiar, then, with the condition *af* Emmons as it exists to-day, and as it existed during that time, are you?
A. Yes, sir.
Q. You know about the population of Emmons?
A. Well, sir, I don't exactly; but as I can figure it, it is between 240 and 250.

49 Q. You have never made an actual count?
A. No.

Q. Do you know what the condition has been of the highway between Emmons and Norman?
A. Yes, sir.
Q. During the time you have been there in business?
A. Yes, sir.
Q. Have you frequently passed over the road?
A. Yes, sir.
Q. What has been the condition, just briefly, and general condition of the road between Emmons and Norman?
A. Between Norman and Emmons the condition of the road has been very bad, part of the year. There have been times when they couldn't pass that road, when they had to take down fences in the spring and drive onto the property of others to get around it.
Q. When do these conditions exist, generally?

A. In the spring of the year.
Q. I suppose that would be in the fall, when you have rains; whenever you have heavy storms?
A. Yes.
Q. How is it in the winter time, when you have snow on the ground?
A. There are times when they have to take down fences and drive on to private property to get around.
Q. Is that the only highway and way you have to get to Norman station?
A. Yes, sir.
50 Q. Are you familiar with the conditions at Norman as to facilities for taking passage on defendant's trains?
A. Yes, sir.

By Mr. CLARKE: I shall not contradict the testimony of your other witnesses on that point.

Q. Do you know whether the depot there is open there in the evening?
A. It is not open at night.
Q. Desiring to take passage on trains—how many of those trains stop at Norman, passenger trains?
A. Two.
Q. And the other two stop when?
A. When flagged with lanterns.
Q. One train going north and one going south?
A. Yes, sir.
Q. What facilities have you there at different seasons of the year, when you are compelled to wait for trains, what do you do?
A. There are no facilities, except to keep yourself on the platform of the station.
Q. To stand out there?
A. Yes, sir.
Q. Have they any hotel accommodations near by, at Norman or around there?
A. No, sir.
Q. How are the goods that are received at Norman; how do you get them over to Emmons?
A. We pay five cents a hundred to have them carted over.

51 EDWARD EMMERSON, called on the part of the relators, and being duly sworn, testified as follows:

Examination in chief.

By Mr. FRENCH:

Q. Where do you live?
A. At Emmons.
Q. How long have you lived there?
A. Over three years.

Q. What is your business?
A. I am a miller, running a flour mill.
Q. Are you the owner of the mill located at Emmons?
A. Yes, sir.
Q. Have you seen this map, Mr. Emmerson?
A. Yes, sir.
Q. Whereabouts on this map is your mill located? Point that out so the court can see it.
A. Here it is.
Q. Indicated on the plat by the word "mill"?
A. Yes.
Q. What is the capacity of that mill, Mr. Emmerson?
A. It is rated at sixty barrels.
Q. Do you run at its full capacity?
A. O, I turn out thirty barrels a day, besides feed, about a hundred sacks of feed besides.
Q. Since you have been there, has that mill been in operation?
A. Yes, sir, steady.
Q. And is in operation to-day; that is, at the present time, before you came up here?
A. Yes, sir, at the present time, every day.

52 By Mr. FRENCH: As I understand counsel, these facts which have been testified to, he informs me, will not be contradicted. That is as to the condition of the road, and the condition at Norman, and the population, and the condition of the business.

By Mr. CLARKE: I shall not undertake to make any denial of the exact correctness of the population at Emmons. I do not know whether I shall seek to show the population of Norman, or not. I know it is a little bit of a town, it may vary somewhat between sixty and seventy-five or a hundred people, but as to the other matters, the fact that there is a road leading from Emmons to Norman, and the conditions testified to generally, by the witnesses, I shall not make any attempt to contradict them. If I do, and counsel wants to call further testimony, he can do so.

By Mr. FRENCH: Do you propose to show what the freight receipts are there?

By Mr. CLARKE: Yes. It is fair to the plaintiff to have that statement in the record, that I will show for the benefit of the complaint or the relator, as well as the respondent, what the business of the station is. I make that statement so it shall not appear that you are left without evidence on that point.

Relators rest.

53 ERNEST E. MCKAIN, called on the part of the respondent, and being duly sworn, testified as follows:

Examination in chief.

By Mr. CLARKE:

Q. You are an employé in the audit office of the Minneapolis & St. Louis Railroad Company, the general office at Minneapolis?

A. Yes, sir.

Q. That is where accounts are kept, showing the business and receipts of each station?

A. Yes, sir.

Q. I will ask you if you have made, or had made from the books, a statement showing the earnings, or the receipts upon goods received, and goods shipped from Norman which applies to and includes only and solely that part of the goods which go to Emmons?

A. Yes, sir.

Q. Have you that with you?

A. I have a copy.

(Witness produces copy of statement.)

Q. This covers the fiscal year of the railroad company's business?

A. Ending June 30th.

Q. What was the total amount received and collected by the Minneapolis & St. Louis Railroad Company, during the fiscal year ending June 30th, 1901, on the business destined to Emmons?

A. Do I understand the total?

Q. Yes.

A. Seven thousand, five hundred forty-seven dollars and sixty-two cents.

Q. That is on business received?

54 A. Yes, sir.

Q. How much of that was on car load lots?

A. Five thousand four hundred nine dollars and twenty-nine cents.

Q. How much of that then was on merchandise other than car load lots?

A. Two thousand one hundred thirty-eight dollars and thirty-three cents.

Q. Now, tell us what the proportion of these collections upon goods received destined to Emmons, represent the earnings of the Minneapolis & St. Louis Railroad Company?

A. The total earnings, four thousand seven hundred eighty-nine dollars and sixteen cents.

Q. What proportion represent the earnings of other lines which deliver these goods to the Minneapolis & St. Louis Railroad Company?

A. That isn't shown in the statement, Mr. Clarke.

Q. It would be the difference between the total revenue and our earnings?

A. No, the local is included in this.

Q. Our earnings were four thousand seven hundred eighty-nine dollars and sixteen cents, you say?

A. Yes.

Q That is the car load lot business?

A. Yes, the entire business.

Q. How much of that was on car load lots?

A. Three thousand fifty-eight dollars and seventy-eight cents.

Q. How much on other merchandise?

A. One thousand seven hundred thirty dollars and forty-three cents.

55 Q. Let us go to goods forwarded from Emmons; what were the total revenues for the fiscal year, collected by the Minneapolis & St. Louis Railroad Company, on shipments from Emmons?

A. Twelve thousand seven hundred ninety-eight dollars and thirty-four cents.

Q. How much of this was on car load lots?

A. Ten thousand four hundred and one dollars.

Q. How much on merchandise other than car load lots?

A. Two thousand three hundred ninety-seven dollars and thirty-four cents.

Q. What were our earnings on car load lots forwarded—what were respondent's earnings?

A. Seven thousand seven hundred forty-eight dollars and seventy cents.

Q. What were respondent's earnings on merchandise other than car load lots forwarded?

A. One thousand sixty-four dollars and thirty-four cents.

Cross-examination.

By Mr. FRENCH:

Q. Can you give me the total amount of goods shipped for this year, that is, the fiscal year, to Norman?

A. No, sir; I have not a statement showing the amount.

Q. How can you tell what portion of the goods shipped to Norman went to Emmons, and the portion that remained at Norman?

A. Our office records show the business at Emmons, under reports from Norman station.

56 Q. Are they kept separate?

A. They are not kept separate, but after each item the word "Emmons" or "Norman" is written on our abstracts. We have had them compiled in that way for some years.

By Mr. CLARKE: The agent at Norman, when he makes his report, enters these shipments as "Emmons" or "Norman," so it shows.

By Mr. FRENCH:

Q. Goods shipped for the Emmons people, if the freight was prepaid at Minneapolis, would your books show?
A. O, yes.
Q. The amount of freight paid?
A. The amount of freight paid at Minneapolis?
Q. Yes.
A. Yes.
Q. Have you included those in this statement?
A. We have included in there reports as shown by our office business.
Q. Whether the freight was prepaid or paid at the end of the line?
A. Yes, sir.

WILLIAM D. WHEELER, called on the part of the respondent, and being duly sworn, testified as follows:

Examination in chief.

By Mr. CLARKE:

Q. You are a civil engineer?
57 A. Yes, sir.
Q. In the office of The Minneapolis & St. Louis Railroad Company, the respondent?
A. Yes, sir.
Q. Are you familiar with the stations and location of the line of the Minneapolis & St. Louis Railroad Company which runs through Freeborn county, Minnesota, and then south through Winnebago county, Iowa?
A. I am.
Q. How frequently have you been over it—I don't mean on the train, but personally, so you know of it?
A. Well, I walked over the line a good many times. I am perfectly familiar with it.

It is admitted that he knows all about it.

Q. Mr. Wheeler, tell me the distance by rail from Norman station to the business center of Emmons, that is, figuring to the business street there.
A. It is seventy-seven one-hundredths of a mile.
Q. What is the distance from Norman station, the depot, to the corporate limits of Emmons?
A. Fifty-six one-hundredths of a mile.
Q. What do you make the distance by wagon road from Emmons to Norman?
A. The distance I have is from the depot to the south end of Main street, which is practically the center of the business portion, ninety-three one-hundredths of a mile.

Q. What railroad facilities and station facilities exist at Norman?

58 A. We have a good passenger and freight depot, business track, stock yards and a well.

Q. Are the facilities there sufficient to accommodate the business that is done and transacted there?

A. Yes, they are.

Q. Are there any industries or business houses at Norman—if so, tell, if you know, what they are?

A. Norman has one elevator, three corn cribs, two scales, two coal sheds, one lumber yard, one flat house, creamery, there is thirteen business houses. I guess that is about all.

Q. How is the business or traffic destined to Emmons, and retained at Emmons, to be forwarded to other points in car loads, handled?

A. We have a spur track at Emmons; cars are set in there and loaded, then switched out and put in the train at Norman.

Q. This spur track leads from where, to Emmons?

A. It is located——

Q. Have you got any drawing that shows the point of connection with the main track, and which joins this track?

A. Yes, sir.

(Witness shows blue print.) This shows the south head block.

(Exhibit "2" shown witness.)

Q. Exhibit "2" shows the line of the Minneapolis & St. Louis railroad there at Emmons, does it?

A. Yes, sir.

Q. Shows the spur track?

59 A. Yes, sir.

Q. This spur track is a shorter track which runs to the elevator and lumber yards?

A. Yes, sir.

Q. Does this show it correctly?

A. Yes, sir.

(Exhibit "2" offered in evidence.)

Q. Then, as I understand you, the traffic goes from Emmons in car loads and to Emmons in car loads; doesn't have to be hauled from Norman?

A. No, sir.

Q. Handled on the spur track in Emmons?

A. Yes, sir.

Q. Are you familiar with Emmons village?

A. Yes, to a certain extent.

Q. When did you familiarize yourself with it for the purpose of testifying in this case?

A. I was there on Monday, this last week, the last time.

Q. You mean Monday the present week, day before yesterday?

A. Yes, day before yesterday.

Q. What manufacturing interests are there in Emmons, except this little grist mill?
A. None at all.
Q. How many dwelling houses are in Emmons?
A. Twenty-four.

By the COURT:

Q. Isn't there a creamery there?
A. Yes, sir.

By Mr. CLARKE:

60 Q. How many buildings are there altogether in the village of Emmons, including business houses and residences?
A. There is about fifty. May be one or two more or one or two less.
Q. How much territory or ground is included within the corporate limits of Emmons, as you understand it?
A. As I understand it there is a whole section, six hundred forty acres, and a quarter section, one hundred sixty acres.
Q. That would be a hundred sixty acres more?
A. Yes.
Q. That would make the line of Emmons on the west side a mile and a half long?
A. Yes, the west line of the corporate limits, as I understand it, would be a mile and a half long.
Q. The south line a mile long?
A. Yes.
Q. The east line, part of the way a mile long and part of the way a mile and a half long?
A. Yes, sir.
Q. You are acquainted with the locations of the stations in that vicinity, the stations on the Minneapolis & St. Louis railroad?
A. Yes, sir.
Q. What is the first station north of Norman?
A. Twin Lakes.
Q. What is the distance from Twin Lakes to Norman?
A. Six and fifty-four one-hundredths miles.
Q. What is the distance between Twin Lakes and Emmons?
61 A. Five and seventy-seven one-hundredths miles.
Q. What is the distance from Emmons to Norman?
A. Seventy-seven one-hundredths of a mile.
Q. Give me the distance from Twin Lakes to the first station south of Norman, or to Lake Mills, which, I believe, is the first station south of Norman?
A. Twelve and twelve one-hundredths miles.
Q. Have you made an examination, a careful examination—surveys and measurements—in fact, have you taken the necessary and proper steps to determine what, if any, engineering obstacles there are to establishing a station at Emmons?
A. Yes, sir.

Relators object to this testimony as incompetent, irrelevant and immaterial, and that there is no allegation in the answer to that effect. It is not in issue under the pleadings.

By Mr. CLARKE: I propose to show by this witness that it is practically impossible to establish a station at Emmons for the reason that the grades will not permit, that the necessary expense involved is so large as to be practically prohibitive and that the necessary and contemplated change in alignment of the Minneapolis & St. Louis Railroad Company, would make a station established at that point absolutely worthless.

Objected to as last above. Objection overruled.

62 A. The village of Emmons is situated on a one per cent. grade, that is, where the main track of the St. Louis road runs through the village of Emmons, it is on a one per cent. descending grade.

Q. Which way?

A. Descending to the south, and trains cannot stop at that station and get out of there with a maximum loaded train without doubling.

Q. Would it be possible with a maximum train as actually operated on the Minneapolis & St. Louis railroad, would it be possible with a mogul engine to start the train out of Emmons upon the grade upon which the yard would be constructed?

A. Not going north.

Q. How would you have to handle it?

A. That train if stopped at Emmons, with a maximum loaded train, it would be necessary to cut it in two, take the front half to Twin Lakes, set it out, and come back and get the last half and take it to Twin Lakes.

Q. That is, you would have to hold the train in two parts and make two trips over the road?

A. Yes, sir.

Q. You couldn't stop on the grade and start, you would have to run from Norman clear through to Twin Lakes and come back and take the balance of the train and take that up separately?

A. Yes, sir.

Q. What other engineering obstacles are there in the way of establishing a station at Emmons?

A. Well, the company is revising all of its lines, taking out the curvature, reducing the grade, they are doing it now. Have been at work all summer. That point at Emmons is one of the
63 contemplated changes, striking out the curvatures, reducing the grade and shifting the line.

Q. Have you made a preliminary survey over the ground to determine—what you call running a preliminary line to establish a contemplated change?

A. Yes, sir.

Q. Have you got a plat that shows it?

(Witness produces Exhibit "3.")

Q. How is this contemplated change shown upon this plat?

Objected to as incompetent, irrelevant and immaterial.
Overruled. Exception.

By Mr. CLARKE: I will have it explained to your honor by expert testimony, that these things, economical and proper railroading, are going to be absolute necessities. I propose to show to the court that we are subjected to a curvature of over two hundred degrees and expect to change it to a curvature of about twenty-five degrees. I will show by experts the necessity of these changes, the economy of making them, and the necessity of removing the curves and grades from tracks in order to hold the maximum trains. We are doing it all along the line.

Q. You may state how that proposed change is shown upon this plat.

It is understood that this testimony with reference to the proposed change is all taken under the same objection as heretofore made, and the decision thereon reserved.

64 Objection. Overruled. Exception.

A. It is shown in red upon the plat.

Q. I will ask you what effect the proposed change will have upon the alignment, the grade, and curvature of the road?

By Mr. FRENCH:

Q. This is your line (indicating on plat)?

A. Yes, sir.

Q. Now your proposed line that you are going to build is down here? (Indicating.)

A. Yes, sir.

By Mr. CLARKE:

Q. Where is the north end of this line, at what station?

A. It is just north of Emmons.

Q. It is on the line between Twin Lakes and Norman?

(Former question repeated.)

A. In regard to the curvature we now have on the present line two hundred sixteen degrees and seventeen minutes, a bad curvature. The proposed line eliminates all of the bad curvature, replaces the two hundred sixteen degrees and seventeen minutes of bad curvature with twenty-five degrees and seventeen minutes of light curvature. It reduces the length of the curvature about four-fifths. It takes out four-fifths of curvature. As to the grade we have a one per cent. maximum grade, ascending through Emmons going north and descending just north of Emmons on a nine-tenths grade—well it practically is one per cent. grade because it isn't compensated for curvature. That will be replaced with six-tenths

65 grade, the entire length of the new line, or nearly the whole length of it, from six-tenths to a level grade and shorten the line between three or four hundred feet.

Q. The line would be three or four hundred feet shorter and be reduced from one per cent. to six-tenths grade, that would be maximum?

A. Yes, sir.

Q. It reduces the curvature from two hundred and sixteen degrees and seventeen minutes to twenty-five degrees and seventeen minutes?

A. Yes.

Q. What is the degree of curvature on this new proposed line?

A. One degree curve, one degree simple curve.

Q. Does that connect with the track at Norman station without an increase of curvature?

A. It does.

Q. And it does not involve the abandonment or establishment of any new station?

A. It does not interfere with the stations whatever.

Plat offered in evidence.
Objected to as last above.
Same ruling; overruled.
Exception taken.

Q. What will be the cost, Mr. Wheeler, of doing the necessary grading and putting in a station at Emmons, as prayed in the petition in this case?

A. Fourteen thousand two hundred sixty-five dollars.

Q. What items are included in that?

66 A. Grading track, switches, bridge. I wrote here depot and platform.

Q. Does that include the maintenance of the depot?

A. No, that does not include the maintenance of the depot.

Q. Does that include the agent's salary?

A. No, sir.

Q. Station supplies?

A. No, sir.

Cross examination.

By Mr. FRENCH:

Q. You say, Mr. Wheeler, you are familiar with the grounds down at Norman?

A. Yes, sir.

Q. How large a depot have you there?

A. Why, it is an ordinary sized depot. I forget the dimensions. I can take it off the plat.

Q. Approximately, about?

A. About thirty by fifty, I believe.

Q. That includes the freight and passenger rooms and ticket office?

A. Yes, sir.

Q. That is a frame building, isn't it?

A. Yes, sir.

Q. Platform?
A. Yes, sir.
Q. Now, do you know whether that is left open evenings or not?
A. I do not. Never got off there at night.
Q. You don't know what facilities passengers have that want to take passage on trains in the night, when they get off there at night?
67 A. I do not; never had occasion to get off at that time of night.
Q. You say there are thirteen business houses?
A. Yes.
Q. Do you mean there are thirteen that are occupied?
A. No, I can't say they are all occupied.
Q. Can you say that there are any more than three occupied?
A. Yes, there is more than that.
Q. What are they, what business represented there?
A. I don't know whether I can state them all or not. There is hardware.
Q. That is a small store, isn't it?
A. It is an ordinary country store, village store.
Q. What else is there?
A. There is a restaurant and a general store—pretty fair sized general store, a blacksmith shop—I couldn't say what others.
Q. Can you name any more that are in vogue there, business places?
A. No, I couldn't say as to any more.
Q. This elevator they have there is one they have recently put up?
A. The elevator part has been rebuilt.
Q. Been rebuilt within the last two months, as a matter of fact?
A. I couldn't say as to that. It was completed when I was there the other day.
Q. That is a small elevator, isn't it?
A. Yes, sir.
68 Q. What is the grade to Norman and for half a mile south, beginning at a point half a mile south of Norman and extending to Norman station?
A. I can't say without referring to the profile. I don't know as I can go that far. (Witness refers to profile.) From a point half a mile south of Norman?
Q. Yes, to Norman station.
A. Well, there is a short piece just about a half a mile south that is on a heavy grade.
Q. Well, what is the grade?
A. Well, it is nine-tenths.
Q. That is very near one per cent. grade, isn't it?
A. Yes, sir; it is very short, about a thousand feet long.

By Mr. CLARKE:

Q. It isn't a place where you stop trains, either, is it?
A. No, sir.

By Mr. FRENCH:

Q. That extends from a point a thousand feet south of Norman up to Norman?
A. No, about up to the switch.
Q. How close does it extend to the depot?
A. The end of that——
Q. Where is the depot there on your plat?
A. The depot isn't down correctly on this plat.
Q. Then how do you know?
A. I am taking the center of the station side-track as shown.
69 Q. Then you don't know?
A. I can tell the distance on the profile.
Q. You know, as a matter of fact, that for a quarter of a mile or less immediately south of Norman it is a heavy grade, isn't it?
A. About a thousand feet, yes, sir.
Q. Is it a descending or ascending grade from the depot north?
A. Descending.
Q. For a thousand feet north of Norman?
A. Six and twenty-nine one-hundredths.
Q. How far does that extend?
A. That extends fifteen hundred feet.
Q. Now, come back here, Mr. Wheeler, to where this proposed depot is to be located near this mill. Now, from where your track there crosses Main street there in Emmons, going north, say for one thousand feet, what is the grade there? I am taking the grade from Main street, where defendant's road in Emmons crosses Main street going north, a thousand feet, what is the grade?
A. The first one thousand feet? The first six hundred feet of that grade is nine-tenths ascending grade on a three degree curve making it practically one per cent.
Q. Leave out your curve. We will get at the curve after a while. From the six hundred feet going north, for the next six hundred feet or a thousand feet, what is the grade?
A. The next is eleven one-hundredths.
Q. How far does that extend, for a thousand feet or six hundred?
A. About nine hundred fifty feet.
70 Q. Starting from that point going north what is your grade?
A. Here is two hundred fifty feet with fifteen one-hundredths grade.
Q. Go right on.
A. Then we strike a seven-tenths and strike a curve with fifty-seven one-hundredths, a sixth degree curve.
Q. Where this depot is ordered to be put in by the commissioners, what is the grade from there north for a thousand feet?

A. I don't know as I know where the depot was ordered in, at what point.

Q. You have testified here as to that grade, that it was impractical. If you don't know where it is, I don't know how you could do that.

Q. You referred to Main street, not the depot.

Q. Do you know where the depot was ordered in?

A. I don't know exactly.

Q. *Well, it is for all practical purposes, we will say it is over here* (indicating), somewheres near this mill?

A. That is north of the mill.

Q. Here is the railroad track, the right of way (indicating). There is the mill there (indicating); just north of the mill (reading from petition), "starting from a point, said point being the section corner between sections thirty-two and thirty-three in township one hundred one, north of range twenty-two west, in said Freeborn county, on the south line of said section; thence running north along the section line between sections thirty-two and thirty-
71 three, a distance of six hundred fifty feet, more or less, to the center line of the railroad of the said Minneapolis & St. Louis Railroad Company, thence northeasterly along said center line a distance of five hundred sixty feet to a point;" five hundred sixty feet from that point up here (indicating), where would that be?

It is agreed it starts in where the railroad crosses the line between the two sections.

By Mr. FRENCH:

Q. Then it runs up here (indicating) five hundred sixty feet to a point, "thence to the right and at right angles to the chord of the curve of said railroad, a distance of fourteen feet to a point, said point to be the southwest corner of station house herein required to be built and maintained; thence left and at right angles to said last course and parallel to said chord a distance of forty-four feet; thence to the right and at right angles to said last course a distance of sixteen feet; thence to the right and at right angles to said last line a distance of forty-four feet; thence at right angles to said last line a distance of sixteen feet to said southwest corner of said required station house;" which brings it substantially opposite the mill. What is the grade at that point where that grade is to be located? What is the grade of that road, say a thousand feet north?

A. North of that point?

Q. Yes.

A. The first two hundred feet is on a one per cent. grade or nine-tenths and compensated.

Q. What is the next nine hundred fifty?

A. Eleven one-hundredths grade.

72 Q. You are familiar with the country in there, aren't you?

A. Yes, sir.

Q. It is practically level?

A. No, I can't say it is. It is rolling.

Q. It is a trifle rolling but can be made level with a very little expense?

A. Not very little. With considerable expense.

Q. Well, it can be made level?

A. Yes, sir.

Q. The obstacle of putting in the depot in there is with the grade?

A. Yes, and also with the division line.

Q. We are talking about the physical obstacles and conditions that will prevent building a depot. But outside of the grade—the grade constitutes the chief objection of putting in a depot there?

A. The grade and the close proximity of another station.

Q. We understand that; but outside of the close proximity of a station, it is the chief obstacle?

A. Yes, sir; the grade.

Q. You are familiar with your line, aren't you, from Minneapolis to the south line of the State?

A. Yes, sir.

Q. How many stations have you along your line where the station is erected on a one per cent. grade?

A. We have none.

Q. You have none?

A. No, sir.

73 Q. Do you pretend to say that you haven't a station that is located on a more than one per cent. grade?

A. We haven't a station that is located on a one per cent. grade.

Q. What are your grades?

A. Why, our grades vary. The stations—nearly all stations are on level ground. Once in a while there is slight descending or ascending grades, either way, from the depot, but very slight, right in the immediate vicinity of the depot or station grounds.

Q. Do you pretend to say, if you had a station in there, you couldn't stop a passenger train?

A. No, sir; I don't pretend to say it.

Q. You couldn't start a passenger train out of there?

A. We can; yes, sir.

Q. Well, you can do it without much inconvenience?

A. No, sir; it costs money and fuel.

Q. It costs money and fuel to stop and start any train?

A. It costs more on that grade.

By the COURT:

Q. What is the maximum train load?

A. That depends on the division. South from Albert Lea a maximum load with a mogul engine, eleven hundred and fifty to twelve hundred tons. It depends whether it is merchandise or heavier material.

Q. What is the minimum?

74 By Mr. CLARKE: I have the superintendent of transportation and I will prove that fully.

By Mr. FRENCH:

Q. What is the character of your track from where it crosses Main street in Emmons, down to the south line?

A. One per cent. grade.

Q. How far does the south line of your switches there at Emmons, where you have a spur, extend, from near the State line?

A. That is about six hundred feet.

Q. Six hundred feet from the State line?

A. About that, yes, sir.

Q. Now do you stop your freight trains and set in empty cars and take out loaded cars out of that spur track?

A. Going south we do.

Q. Do you know whether they do it going north?

A. They do not, with maximum trains.

Q. Do you know that?

A. I do know it.

Q. I don't care whether they are maximum trains or any trains. Do you know whether they take any on?

A. I couldn't say as to that. They might with a light train. I am not prepared to say.

Q. As a matter of fact, you don't know what the men operating those trains do do in that respect?

A. I know a maximum train doesn't stop there, because I have tested it.

75 By Mr. CLARKE: If your honor please, the allegation of the petition under which I am offering this evidence is as follows: "There is a suitable location for a station house upon the present right of way of said railroad company, at the point and upon the property described in the order hereinafter." If there is any question about it I will ask the court for leave to file a short amendment prepared by my associate, as follows: The above named defendant and respondent, by leave of the court, amends its answer and return herein, by adding thereto the following: "Said respondent and defendant denies that there is a suitable location for a station house or station grounds at Emmons; on the contrary, the construction and maintenance thereof would entail great and unreasonable expense upon this respondent, not warranted by the business or requirements of said village, and the construction of said station and necessary yards would interfere with and prevent necessary and contemplated improvements in its said railroad." I think we are perfectly agreed upon one point. The question is an important question to both of us, and I think we are both frankly trying to get at the exact facts and get the case open to the court upon its merits. I have no disposition to do otherwise, and if there should be any question about our right to introduce evidence in controverting the allegation first

referred to, I would ask leave to file this amendment for that purpose.

By the COURT: I think I would prefer to hear the balance
76 of the cross examination of the last witness, before passing upon it.

By Mr. FRENCH:

Q. Mr. Wheeler, I don't know but what you have answered the question already but I am not clear so I will ask you again, to give me the grade of your road for the first six hundred feet north of the station house at Norman?

A. The first six hundred feet north?

Q. Yes, from the station house north?

A. Well, the station isn't located exactly here (indicating), but as near as I can locate it, it is twenty-nine hundredths descending grade north, the first six hundred feet.

Q. Does the grade increase as it goes south?

A. It increases after you get some distance beyond this station.

Q. Well, how many feet?

A. It commences to increase about, between nine and ten hundred feet south of the station.

Q. You stated on your direct examination that it would cost something like fourteen thousand dollars to build a station at Emmons?

A. Yes, sir. What do you mean by building a station? The depot or the whole? What I mean when I say station, or the yards and everything complete.

Q. What would it cost to build the depot building, the station building, sixteen by forty-four feet, and of sufficient height to afford a clear space of ten feet between the ground floor and the ceiling, with a waiting room, eighteen feet long. What would it cost to put up that building?

77 A. Twelve hundred dollars. That doesn't include the platform, just the building.

Q. So a building sixteen by forty-four, of sufficient height to afford a space ten feet between the ground floor and the ceiling, you say would cost twelve hundred dollars?

A. Yes.

Q. What would it cost to build a platform in front of that station house?

A. Two hundred and fifty dollars.

Q. How many feet of siding or side track would you have to have there at that station? How many have you at Norman?

A. In the neighborhood of twelve hundred at Norman.

Q. What would it cost you to put in twelve hundred feet of siding there?

A. At Emmons?

Q. Yes.

A. Well, I don't know as I can state exactly. I can tell what the track and ties would cost.

Q. That is what I mean, track and ties.

A. The iron and ties would cost in the neighborhood of between eleven and twelve hundred dollars.

Q. Laid?

A. No, that is material.

Q. That is, the material there?

A. Yes.

Q. Now, where this depot is proposed to be located, how much of a cut would you have to make, if any, to have it conform to your main track there?

78 A. The main track, as it is at present, would only require a couple of feet, or three.

Q. What would be the cost, in your judgment, of making the proper excavation and laying the ties and rails and putting in the switches there?

By Mr. CLARKE: Do you mean simply making the excavation at the present grade of one per cent.?

By Mr. FRENCH: I mean just as your track is there now.

A. You mean our grade just as it is?

Q. Yes.

A. Did you say tracks, or depot and tracks?

Q. No, just this siding, twelve hundred feet of side track there.

A. Well, I would only figure the excavation required to put that track in. (Witness figures it.) Well, sixteen hundred dollars.

Q. You mean that is for doing the work, putting it in?

A. Grading, laying track and furnishing material.

Q. You can put in twelve hundred feet of side track there so as to have it conform with your present track?

A. Present grade, yes, sir.

Q. Including switches, for sixteen hundred dollars?

A. Yes.

Q. You can put up a depot building for twelve hundred?

A. Yes, sir.

79 Q. Such as described in the order?

A. Yes, sir.

Q. You can build platform for two hundred — fifty dollars, you think?

A. Yes, sir.

Q. You could cinder them for a good deal less?

A. Could what?

Q. Could put in cinders instead of plank for a good deal less money?

A. Yes, we could leave it dirt for less than that.

Q. You do have cinder platforms, don't you?

A. Not on our road.

Q. Not on your road?

A. No, sir.

Q. Now, when that was done, that would furnish you the same accommodations as to side tracks, station room and other facilities that you have at Norman, wouldn't it?

A. As to room, yes, sir; it would.

Q. Yes, that is what I am speaking of. Now your track from Emmons going toward Norman is down grade part of the way?

A. Yes, sir.

Q. And then it is up grade to Norman station part of the way?

A. Yes, sir.

Q. If you should cut down your grade at Emmons and do any excavating, you could use all your earth in raising your track between Norman and Emmons, couldn't you?

A. No, not all.

80 Q. You could use the dirt, couldn't you, if you raised the track?

A. Yes, we could use the biggest portion of it.

Q. You have been raising and lowering your tracks, haven't you?

A. Yes, sir, and changing the alignment.

Q. That is what railroads in the West have been doing for the last four years, is cutting down grades and raising tracks and lowering?

A. Yes, sir; the main object is to reduce the curvature.

Q. And to reduce your grades too, isn't it?

A. Yes, sir; both.

By the COURT:

Q. Isn't the tendency always to raise the track?

A. Raise and lower, both.

By Mr. CLARKE:

Q. Raise it in low places and lower it in high places?

A. Yes.

By Mr. FRENCH:

Q. The dirt you take out in lowering your track at Emmons you can raise it between Emmons and Norman, where it ought to be raised, couldn't you?

A. No, not all of it.

Q. You would need dirt to raise it, wouldn't you?

A. Yes, sir.

Q. Now, good railroad, if you maintain your track where it is, would demand that you lower your track at Emmons; that

81 is, cut down your grade, and raise it in low places between there and Norman, wouldn't it?

A. No, sir; it would mean a change of alignment at that point, good railroading.

Q. A change of the whole track?

A. Yes.

Q. Well, I say, if you had to maintain it at that place, you would lower your track and raise it, wouldn't you?

A. Yes, sir.

Q. If you change your track you can put in a depot near the State

line, can't you, on your new proposed line, without any difficulty; that is, so far as the contour of the ground is concerned, or grade or curves?

A. No, sir; it would require a great amount of grading and expense.

Q. I mean this State, supposing you put it in in this State?

A. Yes, sir.

Q. If you should complete your new line there that you have got marked with red on that plat, you could then put in the station?

A. No, not without great expense of grading. Not at that point at the State line.

Q. So it don't matter whether you change your line or allow it to remain where it is, you can't put in a station without great expense, that would accommodate the people of Emmons short of Norman; that is true, isn't it?

A. Yes, sir.

By the COURT:

82 Q. How far is it from the State line to the proposed site of the depot; I understand witness in the last part of his testimony has been referring to the building of the station at the State line?

By Mr. FRENCH: The idea was, if it was practicable, or without very much expense, they could erect a depot between the State line and Emmons on the line that they have proposed.

A. It would require a great amount of grading and expense.

Q. It would be just about as impracticable as the present line?

A. Yes.

Q. They have a large creamery there at Emmons, haven't they?

A. I don't know what the capacity is. It is an ordinary country creamery.

Q. You don't know anything about its capacity?

A. No, sir.

Q. You don't know, as a matter of fact, that it is one of the largest creameries in Freeborn county?

A. No, sir; I do not.

Q. You know they have got a creamery there?

A. Yes, sir.

Q. Are you familiar with the country tributary to Emmons?

A. Well, right in the vicinity of the railroad track; not back a ways, I am not.

Q. Well, with the towns?

A. Yes, sir.

83 Q. Where is the nearest town north of Emmons?

A. Twin Lakes, on our road.

Q. That is a very small point, isn't it?

A. Why, it is a small town, yes. I don't know how much the population is.

Q. Well, there is very little business done there, isn't there; isn't that a fact?

A. Well, I couldn't say as to that; there is a country business, how much I don't know.

Q. Is there any town west of Emmons, that you know of?

A. I don't know of any. I am not familiar.

Q. You are not familiar enough so you know?

A. No, sir.

Q. Now, do you know the country that is tributary to Emmons—how large a scope of country that takes in, that go there to do their marketing and trading?

A. No, I do not.

Q. Now, you have given us, Mr. Wheeler, the cost of the depot building and platform, the cost of putting in a side track; what did the balance of your fourteen thousand dollars that you gave us—how was that made up?

A. In grading preparatory for tracks.

Q. Grading where; did that include the cutting down of the track?

A. Yes, cutting down the grade.

Q. How much of a cut did you make there?

A. Forty-two thousand eight hundred yards excavation.

Q. About how deep a cut would that be from the surface?

84 A. I haven't got the profile here. It is about nine or ten feet here in the deepest place.

Q. And about what length was that excavation?

A. That is a little over three thousand feet long.

Q. North and south from where the proposed depot is to be located?

A. Yes.

Q. What width did that include, that excavation?

A. Well, on the extreme north end it is figured on a thirty foot road bed. In the cut and down toward the south end, where the yards are to go in, it included a cut of sixty-one feet.

Q. How many tracks did that estimate include?

A. Two tracks.

Q. That is, main track and side track?

A. Main track, side track and passing track.

Q. How long were the side track and passing track?

A. Passing track twenty-four hundred feet, house track twenty-one hundred fifty feet.

Q. Doing all that work and then putting in a depot and so on, you made it something like fourteen thousand dollars?

A. Yes, sir.

Q. Did anything else ever enter that estimate?

A. A bridge.

Q. Where was that?

A. Across the outlet of State Line lake. State Line creek, I believe they call it.

85 Q. How long was that bridge?

A. Forty-eight feet long.

Q. You have a bridge there now, haven't you?

A. Yes, sir.

Q. But you proposed to put in a new bridge?

A. Yes, sir; we would have to to get on there, to get across it.

Q. Did you propose to run your track across there?

A. Yes, the yard would extend across there. Twenty-four hundred feet of passing track would extend to the south end of this bridge.

Q. That is, if the depot was erected up where they have ordered it, by the mill?

A. Yes, sir.

Q. How far north would your passing track extend?

A. About twelve hundred feet north of the depot, as I recollect it now—eleven or twelve.

Q. But this estimate which you have given is all based upon building that bridge and putting in tracks that you have last described here?

A. Yes.

Re-direct examination:

By Mr. CLARKE:

Q. The estimates you have made are based upon putting in a standard yard, of stations of that class, on the Minneapolis & St. Louis railroad?

A. Yes, sir; the same as we are building to-day. When we organize a yard or make any improvements, our stations go in on that plan.

86 By the COURT: My understanding is, so far as the amendment is concerned, that all the testimony it would affect has already been allowed to go into the case.

By Mr. FRENCH: Under the ruling of the court, that testimony was all admitted under our objection. I am not prepared to meet this at all, and I am willing to let it stand or fall under that objection.

A. P. TANNER, called on the part of the respondent and being duly sworn, testified as follows:

Examination in chief:

By Mr. CLARKE:

Q. You are the superintendent of transportation for the Minneapolis & St. Louis Railroad Company, are you not?

A. Yes, sir.

Q. Who has charge of the maintenance of station buildings on that line?

A. The chief engineer.

Q. Who has charge of the maintenance of the station service, including station supplies, wages, operators and fuel, such things as that?

A. I do.

Q. What would be the expense, either monthly or annually—state it according to your own rules—of maintaining a station at Emmons, a station of that class? By maintenance I refer particularly to the cost of operator, fuel and station supplies.

87 A. Somewhere between nine hundred and a thousand dollars a year, including all the items you have mentioned.

Q. Do you know what trains carrying passengers, pass through the station of Norman, each twenty-four hours? If so, state what they are and their time each way.

A. We have two passenger trains each way, and two freight trains each way. (Witness refers to schedule), No. 1, north bound through Norman, at 2:22 p. m.; No. 3, which is a flag stop at Norman, at 3:15 a. m.; No. 53, at 4:47 p. m.; No. 2, regular stop, south bound at Norman, 1:55; No. 4, flag, 1:02 a. m.; and No. 54, regular stop at 9:35 a. m.

Q. Do all these trains carry passengers?

A. No, sir.

Q. No. 53 and '4 are freight trains carrying passengers?

A. Freight trains carrying passengers.

Q. What is the maximum tonnage of freight trains on the Minneapolis & St. Louis railroad? I mean actual service, just such trains as are being run now?

A. Through Albert Lea, our maximum north bound tonnage is from eleven to twelve hundred tons, with Mogul engine trains.

Q. What is the number of cars?

A. That depends, Mr. Clarke, whether they are loaded or empty, but figuring on their being ordinary loads, say from thirty-five to thirty-eight cars.

By the COURT:

Q. Loaded cars?

88 A. Yes, sir.

Q. What would be the length of the train?

A. Including engine and caboose, I could only figure on the average length car, somewhere in the neighborhood of fifteen hundred feet.

Q. You have heard the testimony of Mr. Wheeler as to the grade at the point of the proposed station; that is, nine-tenths, or one per cent. on a three degree curve, which he figured with compensation as being one per cent.?

A. Yes, sir.

Q. What do you say as to the abiiity to handle a maximum freight train of the respondent, north bound, with a heavy Mogul engine on that ground, assuming a stop was made at the station of Emmons?

A. A maximum loaded train on that ground could not start. A

Mogul engine could not start a maximum loaded train on that grade. They would be obliged to double, as it is termed.

Q. How would it have to be handled in practical operation?

A. The usual method is to take the head end up to a point where they can side track it and go back and get the balance of the train.

Q. Where would be the point you could side track a north bound train?

A. Twin Lakes.

Q. You mean you would have to run from Norman to Twin Lakes?

A. We would have to double from Emmons to Twin Lakes.

Q. I mean from Emmons?

A. A maximum train on that grade.

89 Q. I call your attention to Exhibit No. "3" and ask you to inform the court as to the proposed change of alignment and the necessities and reasons therefore?

Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception.

A. This is merely a part of the general change in the line which I have recommended from Albert Lea to Lake Mills, which I have recommended to the management. It is under serious consideration. Our curves, alignment, and grades between Lake Mills and Albert Lea are very poor, as a whole. Part of that has already been accomplished in a small change of line south of Albert Lea. The grades are such that a maximum train is handled with a great deal of difficulty, and I have recommended to our people, as I say, a general change of line from Lake Mills to Albert Lea, and it is being seriously considered. In fact, last season a considerable portion of this track was not bal-asted as it should have been for the simple reason this change was under consideration. Every degree of curvature that would eliminate helps us in handling the trains. That is exemplified by some changes we have already made north of Albert Lea where we reduced our grades from one per cent. maximum to a sixteenth maximum; train tonnage has increased on that particular line from—well, our ability to handle maximum trains on that particular portion of the line has been increased from eleven hundred

90 and fifty and twelve hundred at different times to fourteen hundred fifty or fifteen hundred tons with some classes of engines.

Q. You are familiar with the present alignment of this track at the point shown?

A. Yes, sir, I believe I am fairly familiar with it, Mr. Clarke?

Q. What do you say as to the necessity and propriety for the change suggested, and the effect it will have upon the ability of your department to handle the increased tonnage with the same power, having regard to the change included in the reduction of curvature and reduction of grade?

A. As a part of the whole change which I have recommended?

Q. Yes.

A. It will enable us to effect the same increase in the train tonnage, and consequent economic operation I have already described north and east.

Q. What is the maximum grade of the Minneapolis & St. Louis railroad on that division?

A. On the Southern division?

Q. Yes.

A. One per cent.

Q. That is the extreme, the highest grade we have got?

A. It is the highest of which I have any recollection, yes, sir.

Q. What will be the effect in grade reduction of this change at that point?

A. The proposed line gives us six-tenths maximum grade with a reduction in curvature.

91 Cross examination.

By Mr. FRENCH:

Q. These trains that you speak of, are they through freights?

A. Which trains, please?

Q. Well, the trains of from thirty to thirty-five cars?

A. We handle trains of that length both through and local, Mr. French.

Q. What are your average local trains, what will they average?

A. That is a difficult question to answer. Some days they are run from Albert Lea to Fort Dodge with twelve or fourteen cars, other days they will go through with a full train.

Q. Do you know what the grade is north of where this proposed depot is to be located?

A. No, sir; I do not with absolute certainty.

Q. You don't know as to that?

A. No, sir.

Q. I suppose good railroading, in this day and age, requires that all grades be cut down, eliminated as far as possible?

A. It is a necessity being forced on us as rapidly as can be accomplished.

It is admitted that, at the time of the original construction of the Minneapolis & St. Louis railroad, the people of Norway township, Winnebago county, Iowa, in which township Norman station is located, voted a five per cent. tax to aid in the construction of the railroad, upon the condition that a station should be located and maintained within one mile of the northeast corner of Winnebago
92 county, and that Norman station is the station which was located and has been maintained pursuant to that agreement.

By Mr. FRENCH: This is subject to our objection as to incompetency, irrelevancy and immateriality.

It is also agreed that the station of Norman was established sev-

eral years before the village of Emmons was built or came into existence.

It is also admitted that the village of Emmons was duly incorporated in the year 1899.

GEORGE H. EMMONS recalled on the part of the relators, and testified as follows:

Examination in chief.

By Mr. FRENCH:

Q. What portion of the territory tributary to Emmons, where the people do their marketing and trading at Emmons?

A. It is about eight miles west and northwest, about five or six miles north, about eight miles east and about three miles south.

Q. How is that country as to being settled up and well populated?

A. It is all a good country and thickly settled.

It is admitted that a petition, as alleged in the petition and writ of mandamus, was presented to the Board of Railroad and Warehouse Commissioners, asking for an order requiring the respondent to build a station house at Emmons.

Testimony closed.

93 I do hereby certify that the above and foregoing is a true and correct transcript of the evidence given and received in the above entitled action, and constitutes all the proceedings had therein, to the best of my knowledge and ability.

A. D. DENISON,
Official Court Reporter.

The foregoing case, proposed, is correct, and may be settled and signed and allowed by the court, without further notice.

W. B. DOUGLAS,
Attorney General,
H. H. DUNN, AND
LAFAYETTE FRENCH,
Attorneys for Relator.

Dated January 31st, 1902.

The above entitled case and bill of exceptions having been presented to me, the court who tried the same, within the time for settlement and allowance thereof, and having been found to be conformable to the facts, and having been by me found to be true and containing all the evidence and proceedings herein, the same hereby is settled and allowed as and for the settled case and bill of exceptions herein.

JAMES H. QUINN,
District Judge.

Dated February 7th, 1902.

At the request of the attorney for the respondent, The
94 Minneapolis & St. Louis Railroad Company,

Ordered, that the above and foregoing settled case and bill of exceptions be incorporated into and made a part of the judgment roll in the above entitled action, and attached to the judgment roll.

JAMES H. QUINN,
District Judge.

Dated February 7th, 1902.

(Title of Cause.)

Order.

This is a hearing upon the return of an alternative writ of mandamus, duly issued and directed to the respondent railroad company, requiring it to comply with an order of the State Railroad and Warehouse Commissioners, of the State of Minnesota, issued on the 15th day of October, A. D. 1901, or show cause why it should not so comply with said order.

The cause being at issue and upon the calender of this court at the December, 1901, general term thereof, was reached for trial on the 4th day of December, A. D. 1901, when Lafayette French, Esq., and H. H. Dunn, Esq., appeared as counsel for the relator, and Albert E. Clarke, Esq., appeared as co-nsel for the respondent. The cause was tried to the court, without a jury, upon the pleadings and files and proofs of the parties, and was thereafter submitted upon written briefs.

95 Now, having heard and considered all matters and things involved herein, and having heard counsel for the respective parties,

It is found as matters of fact: That Ira B. Mills, J. G. Miller and C. F. Staples are the duly elected, qualified and acting railroad and warehouse commissioners of the State of Minnesota, and that at all times herein stated A. K. Teisberg was the duly appointed, qualified and acting secretary of said Board of Railroad and Warehouse Commissioners.

That said board of commissioners, during all the time herein referred to, had complete jurisdiction and authority over the respondent, The Minneapolis & St. Louis Railroad Company, as well as over all subject matter here in controversy.

That during all the time herein referred to, the village of Emmons was, and now is, a municipal corporation duly organized and incorporated under and by virtue of the laws of the State of Minnesota, and situated in the county of Freeborn.

That at all the times hereinafter referred to, the respondent, Minneapolis & St. Louis Railroad Company was, and now is, a railroad corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, owning and operating a line of railroad extending from the city of Minneapolis, south through the village of Emmons to the south line of the State of Min-

nesota, and during all of said time was, and now is, the owner of and engaged in running and operating its trains of cars upon and over said line of road as a common carrier of freight and passengers for hire.

96 That the respondent railroad company has no depot or station house whatever for the accommodation of the public upon its line of railroad at the village of Emmons, and that its line of road is the only line of railroad reaching such village.

That there is a suitable location for a depot or station house upon respondent's right of way at the point referred to and described in the order of the Board of Railroad & Warehouse Commissioners herein, which order is hereto attached. That it is necessary for the accommodation of the citizens of Emmons and vicinity, and the public at large, and public necessity requires, that the respondent railroad company build and maintain a suitable station house at the said village of Emmons for the accommodation of the public transacting business with the respondent at that point.

That heretofore a petetition in due form was presented to the Board of Railroad and Warehouse Commissioners of the State of Minnesota, asking for an order requiring the respondent railroad company to build and maintain a station house at the said village of Emmons for the accommodation of the public.

That pursuant thereto said board fixed a time and place of hearing upon such petition, due notice of which was given to the respondent railroad company, and a hearing upon said petition was duly had at the city of St. Paul on the second day of July, 1901, at which time, after hearing and considering all matters referred to in such petition, the said Board of Railroad and Warehouse

97 Commissioners made an order requiring the respondent railroad company to build and maintain a station house for the accommodation of the public upon its said line of road at the said village of Emmons, at a point set fourth and designated in said order, on or before the first day of September, 1901, which order was duly served upon the respondent railroad company on the 8th day of July, 1901.

That the respondent railroad company has in all things failed and neglected to comply with the provisions and requirements of such order of the Board of Railroad and Warehouse Commissioners, and still refuses to build and maintain a suitable station house for the accommodation of the public in transacting business with the respondent upon its line of railroad at the said village of Emmons.

As conclusions of law it is found: That the relator is entitled to a peremptory writ of mandamus, commanding the respondent, The Minneapolis & St. Louis Railroad Company, to forthwith comply with the order herein referred to, of the Board of Railroad and Warehouse Commissioners of the State of Minnesota, dated on the second day of July, 1901, and to forthwith build and maintain a good and suitable station house, properly heated and lighted, with suitable platform, upon its line of road at the village of Emmons, Freeborn county, Minnesota, of the dimensions and proportions set

forth in the said order of the Board of Railroad and Warehouse Commissioners, for the accommodation of the public in transacting business with the respondent railroad company at that point.

98 Let the judgment be entered in accordance with the foregoing findings.

Dated this 30th day of December, A. D. 1901.

JAMES H. QUINN,
Judge of the District Court of the 17th Judicial District, Acting for the Judge of the District Court of the Tenth Judicial District.

(Title of Cause.)

Judgment.

This cause, being regularly on the calendar of the December, A. D. 1901, general term of this court, upon the petition and alternative writ of mandamus duly issued and directed to the respondent, The Minneapolis & St. Louis Railroad Company, and the respondent's answer to said writ; and having been duly reached in its order for trial, at the court house in the city of Albert Lea, Minnesota, on the 4th day of December, A. D. 1901, Lafayette French, H. H. Dunn and John G. Skinner, Esqs., appeared as counsel for the relator; and Albert E. Clarke, Esq., appeared as counsel for the respondent; and the respective parties having waived a jury trial and the cause being tried to the court; and the court having made and filed its findings and conclusions of fact and law in said cause; and the court having found as a conclusion of law that the relator is entitled to *to* peremptory writ of mandamus commanding the respondent, The Minneapolis & St. Louis Railroad Com-

99 pany to forthwith comply with the order herein referred to, of the said Board of Railroad and Warehouse Commissioners of the State of Minnesota, dated on the 2d day of July, A. D. 1901; and to forthwith build and maintain a good and suitable station house, properly lighted and heated, with suitable platforms, upon its line of railroad at the village of Emmons, Freeborn county, Minnesota, at the place designated in the order of the said Railroad and Warehouse Commissioners, of the dimensions and proportions set forth in the said order of the Board of Railroad and Warehouse Commissioners, for the accommodation of the public transacting business with the respondent railroad company at that point, and directing and ordering judgment to be entered accordingly.

Now, upon motion of Lafayette French, H. H. Dunn and John G. Skinner, Esq., attorneys of the relator,

It is ordered and adjudged, that a peremptory mandamus issue without delay, directed to the said respondent, The Minneapolis & St. Louis Railroad Company, commanding it, upon pain and peril that shall fall thereon, to build and maintain a station house for the convenience and accommodation of the public and the people of

Emmons transacting business with said railroad company, at the point designated herein, upon the following described property, situated in the county of Freeborn and State of Minnesota, to-wit: Starting from a point, said point being the section corner between section-
thirty-two (32) and thirty-three (33), in township one hundred
100 one (101) north, of range number twenty-two (22) west, in said Freeborn county, on the south line of said section; thence running north along the section line between sections thirty-two (32) and thirty-three (33) a distance of 650 feet, more or less, to the center line of the railroad of said Minneapolis & St. Louis Railroad Company; thence northeasterly along said center line a distance of 550 feet to a point; thence to the right and at right angles to the chord of the curve of said railroad a distance of 14 feet to a point, said point to be the southwest corner of the station house herein required to be built and maintained; thence left and at right angles to said last course and parallel with said chord a distance of forty-four (44) feet; thence to the right and at right angles to said last course a distance of sixteen (16) feet; thence to the right and at right angles to said last line a distance of forty-four (44) feet; thence at right angles to said last line a distance of sixteen (16) feet to said southwest corner of said required station house.

It is further ordered and adjudged, that said station house, outside measurement, be sixteen (16) feet by forty-four (44) feet, and of sufficient height to afford a clear space of ten (10) feet between the ground floor and the ceiling of said station house; and that said station house contain a waiting room that shall be the width of said building and at least eighteen (18) feet long, which waiting room shall be suitably lighted and heated for the accommodation of the traveling public and patrons of said road at the village of Emmons,

And it is further ordered and adjudged, that said station
101 house be provided with suitable platforms for the purpose aforesaid; and that the same be hereafter maintained as a legal station house of said railroad company, according to the command of the said former alternative writ of mandamus.

And it is further ordered and adjudged, that the relator have, and recover of the respondent, their costs and disbursements in this action, in the sum of — dollars, to be hereafter taxed and included in said judgment.

Witness the Hon. Nathan Kingsley, judge of the district court aforesaid, at the city of Albert Lea, Minnesota, this 13th day of January, A. D. 1902.

A. S. HAYES,
Clerk of the District Court.

[SEAL.]

(Title of Cause.)

Notice of Appeal.

To W. B. Douglas, attorney general; Lafayette French, and H. H. Dunn, attorneys for the above named relator, and to A. S. Hayes, Esq., clerk of said district court:

Please take notice, that the above named respondent, The Minneapolis & St. Louis Railroad Company, appeal- to the supreme court of the State of Minnesota from the judgment of the said district court, entered herein on the 13th day of January, A. D. 1902,
102 against said respondent in above entitled proceeding, directing that a peremptory writ of mandamus issue, commanding the Minneapolis & St. Louis Railroad Company to build and maintain a station house and platform at Emmons, in said county, and from the whole thereof.

Dated this 10th day of February, A. D. 1902.

ALBERT E. CLARKE,
Attorney for Respondent.

Duly served and filed.
Bond on appeal duly approved, served and filed.

103 (Endorsed:) 13034. State *ex rel.* R. R. & Warehouse Commissioners respondent *vs.* Minneapolis & St. Louis R. R. Co. appellant Return Filed March 24, 1902 D. F. Reese clerk.

104 13034.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1902.

STATE OF MINNESOTA *ex Rel.* RAILROAD AND Warehouse Commissioners, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS R. R. Company, Appellant.
} No. 135. Syllabus.

Judgment of the district court in mandamus proceedings requiring and compelling defendant railway company to erect and maintain a depot building in the incorporated village of Emmons, Laws 1901, ch. 270, affirmed by a divided court, one member being disqualified from taking part.

Order affirmed.

105 13054.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1902.

STATE OF MINNESOTA *ex Rel.* RAILROAD AND WAREHOUSE COMMISSION, Respondent, *vs.* THE MINNEAPOLIS & ST. LOUIS RAILROAD Company, Appellant. } No. 136. Opinion.

By the COURT: This is the second attempt on the part of the citizens of the village of Emmons, situated on defendant's line of road, to secure a depot building for the accommodation of the people residing there and in that vicinity. Their first was in the year 1897, when they proceeded by petition to the Railroad and Warehouse Commissioners, upon which a hearing was had and an order filed requiring the defendant company to build and maintain a depot, within a prescribed time. It refused to comply with this order, and the State, on the relation of the commissioners sought to compel obedience by mandamus. On a trial the court below found against the company and from a judgment, subsequently entered, an appeal was taken to this court, where the judgment was
106 reversed and a new trial granted: 76 Minn. 469, wherein the facts are stated. We assume that this proceeding was abandoned, because in 1901, another was instituted of the same character and for the same purpose. After a hearing the commissioners made a second order, requiring the building and maintenance of the station house or depot as prayed for, and, as before, the railway company refused to obey. Thereupon another mandamus proceeding was instituted in the district court. The present appeal is from an judgment therein entered commanding the railroad company to build and maintain a station house or depot upon a certain described tract of land within the village, which became incorporated under the provisions of General Statutes 1894, section 1200, just prior to the commencement of this action.

Mr. Associate Justice Lovely having been of counsel for the village in the former proceeding, was disqualified from sitting at the hearing of this appeal and the cause was necessarily argued and submitted to the four remaining members of the court. We assume that Laws 1901, chapter 270, which in express terms requires railway companies to build and maintain depots or station houses in all villages through which their roads may pass, is in itself valid legislation and not open to the objection that it is not within the legislative power to enact such a law. With this assumption no dispute has arisen over a construction of the act, to the effect that all incorporated villages within this State located on railway lines are
107 *prima facie*, entitled to depots. The commissioners have the power to order the erection and maintenance of depot build-

ings unless it is made to appear that such an order would be so unreasonable in its terms as to actually result in depriving the company proceeded against of its property, without due process of law. The change made by the statute of 1901, simply affects or shifts the burden of proof, for prior to its enactment the burden was on the municipality to establish the reasonableness and necessity of a depot therein, while, now, a railway company appearing before the commissioners, or trying its case on appeal to the district court bears the burden of showing that such a requirement is not called for and that the building and maintenance of a depot in the village is unnecessary and unreasonable.

But while agreeing as to this interpretation of the law, we fail to reach the same conclusion in respect to the facts. We do not question the correctness of the conclusion reached when considering the former appeal. But two members of the court, Mr. Chief Justice Start and Associate Justice Brown, are of the opinion that, from the evidence, it appears that there has since been a substantial growth in the village, a growth which makes an altogether different showing, and that the company did not overcome the *prima facie* case arising by virtue of the statute and therefore that the judgment appealed from should be affirmed. Associate Justice Collins and
108 Lewis are unable to agree to this. Their conclusion is that the testimony fails to show that there has been a real or substantial change in the village, its needs or necessities, that the situation is practically as it was when the former proceeding was considered and that the *prima facie* case made by the village has been wholly overcome by the defendant company.

With this difference of opinion the judgment appealed from must be and hereby is affirmed.

109 [Endorsed:] No. 13034 State of Minnesota, supreme court. State *ex rel.* R. R. & Warehouse Com. respondent *vs.* Mpls. & St. Louis R. R. Co. appellant Copy of opinion and syllabus Filed August 1 1902 D. F. Reese clerk. April term, A. D. 1902 *Per curiam.* J.

110 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1902.

STATE OF MINNESOTA *ex Rel.* RAILROAD AND WAREHOUSE Commissioners, Respondent,
vs.
MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY, Appellant. } No. 135.

Pursuant to an order of court duly made and entered in this cause, on the 23 day of August A. D. 1902

It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to-wit, of the dis-

trict court of the tenth judicial district, sitting within and for the county of Freeborn be and the same hereby is in all things affirmed

And it is further determined and adjudged that the respondent above named, do have and recover of said Minneapolis and St. Louis Railroad Company appellant herein the sum and amount of fifty five and 25/100 dollars ($55.25) costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 23 day of August A. D. 1902.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees, for making return	
Printer's fees	20.25
Clerk's fees, supreme court	10.00
Filing mandate	
Affidavits and acknowledgments	
Postage	
	$55.25

111 [Endorsed:] 13034 State of Minnesota, supreme court. Transcript of judgment. Filed August 23 A. D. 1902. D. F. Reese, clerk. —— —— attorney for —— Page No. 105 "Z" book.

STATE OF MINNESOTA, *Supreme Court,* } *ss:*

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court at the capitol, in the city of St. Paul, this 23 day of August, A. D. 1902.

D. F. REESE, *Clerk.*

112 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1902.

STATE OF MINNESOTA *ex Rel.* Railroad and Warehouse Commissioners, Respondent, vs. MINNEAPOLIS AND ST. LOUIS RAILROAD CO., Appellant.	No. 135. Appeal from District Court, Tenth Judicial District, County of Freeborn.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1902, upon the return to the appeal herein.

Now after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be and the same hereby is, in all things affirmed and that the respondent above named have judgment accordingly.

Entered August 23 A. D. 1902.

By the court:

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

113 [Endorsed:] No. 13034 State of Minnesota, supreme court. Copy of order for judgment. Filed August 23 A. D. 1902. D. F. Reese, clerk. Entered on page 89 "O"

114 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1902.

TUESDAY MORNING, 9.30 O'CLOCK, *June* 3, *A. D.* 1902.

Court convened pursuant to adjournment. All the justices being present.

STATE OF MINNESOTA *ex Rel.* RAILROAD AND Warehouse Commissioners, Respondent, vs. MINNEAPOLIS AND ST. LOUIS RAILROAD CO., Appellant.	Cal. No. 135; Reg. No. 13034.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by appellant, submitted by respondent, to the court and taken under advisement.

A true record.

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

115 [Endorsed:] 13034 State of Minnesota supreme court. Copy of minutes of argument. Filed August 23 A. D. 1902 D. F. Reese clerk.

116 [Endorsed:] No. 13034 State of Minnesota, supreme court. State of Minnesota *ex rel.* Railroad & Warehouse Com'rs respondent against Minneapolis & St. Louis R. R. Co. appellant Judgment roll. Filed August 23 1902 D. F. Reese clerk.

117 STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of the supreme court of Minnesota do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record in said court in the case of State of Minnesota *ex rel.* Railroad and Warehouse Commission, plaintiff and respondent, and The Minneapolis and St. Louis Railroad Company, defendant and appellant, in said supreme court, including the pleadings, exhibits, stipulations, judgment, judgment-roll, opinion of said supreme court in said cause, assignment of errors made and filed in said cause by the defendant and appellant, and all papers filed and proceedings had in said cause in said court.

I do further certify and return that I have annexed to said transcript and included therewith the original writ of error from the Supreme Court of the United States; the original citation issued therein, with proof of service thereon; also copy of the original petition for the allowance of said writ of error, together with the assignment of errors, and a copy of the bond on said writ of error, and that the foregoing constitutes a full, true and complete return to said writ of error.

I do further certify that section 3 of rule 9 of the supreme court of Minnesota is and has been at all times while said case was in said court, as follows:

"Prefixed to the brief of the appellant, but stated separately, shall be the assignment of errors intended to be urged. Each specification of error shall be separately, distinctly, and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below or referee is

not sustained by the evidence, it shall specify particularly the finding complained of. No error not affecting the jurisdiction over the subject-matter shall be considered unless stated in the assignment of errors."

The assignment of errors incorporated in the foregoing record entitled "Assignment of errors made and filed by defendant and appellant in State supreme court" was duly made and filed in said State supreme court on the 25th day of April 1902, prefixed to the brief of appellant and stated separately in accordance with the rules of practice of said court in all things, and were a part of the rec-
118 ord in said court upon which said cause was heard and determined.

In witness whereof I have hereunto set my hand and the seal of said supreme court of the State of Minnesota, at the capital, St. Paul, Minnesota, this 22nd day of September, A. D. 1902.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 18684. Minnesota supreme court. Term No. 138. The Minneapolis & St. Louis Railroad Company, plaintiff in error, *vs.* The State of Minnesota *ex rel.* The Railroad & Warehouse Commission. Filed October 9, 1902.

SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

No. 188.

Office Supreme Court U. S.
FILED
JAN 4 1904
JAMES H. McKENNEY,
Clerk.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

THE STATE OF MINNESOTA, EX. REL. THE RAILROAD AND WAREHOUSE COMMISSION.

In Error to the Supreme Court of Minnesota.

BRIEF OF PLAINTIFF IN ERROR.

ALBERT E. CLARKE,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

No. 138.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

THE STATE OF MINNESOTA, EX. REL. THE RAILROAD AND WAREHOUSE COMMISSION.

In Error to the Supreme Court of Minnesota.

BRIEF OF PLAINTIFF IN ERROR.

THE CASE.

This is a mandamus proceeding instituted to compel the plaintiff in error to establish and maintain a railroad station upon its line of railroad, at a point less than one mile from an existing station supplied with ample facilities. The point at which the additional station is demanded, is not only less than a mile from an existing station, but is also upon a sharp and dangerous curve. The elimination of this curve, which is only prevented by this litigation, will not affect the existing station, but cannot be made, if the judgment is sustained. The questions here involved have been litigated in two proceedings in the state courts. In the first proceeding, the District Court decided against the plaintiff in error. Upon appeal to the State Supreme Court, the judg-

ment was reversed, and the case decided in favor of plaintiff in error upon the merits. Some years later, the present proceeding, of identical character, upon the same facts, was instituted. Again the District Court entered judgment for the relator, and an appeal to the State Supreme Court was taken by the plaintiff in error. Upon this appeal, the Justices sitting, were evenly divided, the personnel of the Court having changed; the decision of the lower court being affirmed by a divided court. The only decision of the case upon the merits, by the State Supreme Court, was in favor of the plaintiff in error.

Detailed History of the Case.

The Minneapolis & St. Louis Railroad extends from the city of Minneapolis, Minnesota, in a southerly direction to Angus, Iowa, a distance of two hundred and sixty miles; crossing the state line between Minnesota and Iowa, at a point about midway between Minneapolis and Angus. The most southerly county in the state of Minnesota, crossed by this railroad, is Freeborn county. The most northerly county in the state of Iowa, upon the same line of railroad, is Winnebago county; the state line running between the two counties. A map in the back of this brief shows the location of the railroad, and the stations referred to in argument. At the time the railroad was built, the citizens of Norway township, Winnebago county, Iowa, by authority of a statute of that state, voted a tax of five per centum of the assessed valuation of all property in the township, to aid in its construction, *upon the condition* that a station should be established and maintained upon said railroad, within one mile of the northeast corner of Winnebago county. Norway township adjoins the state line on the south; is the northeast township in Winnebago county, Iowa, and is the first township entered by the railroad after crossing the state line, from Minnesota. Pursuant to this agreement, *made at the time the railroad was built, in consideration of the aid voted*, a station named NORMAN, was established, and has ever since been maintained. *Printed Record, page 58, folio 92.*

The station of Norman is located close to the line

which constitutes the southern boundary of Minnesota, and the northern boundary of Iowa. The state line is also the northern boundary of the village of Norman. At this station, the Railroad Company, the plaintiff in error, maintains a good passenger and freight depot, business tracks, stock yards, etc. The facilities are ample to accommodate the business of the station. *Record, page 40, folio 58.*

The country in this vicinity is purely agricultural, fairly well settled, and I do not think any claim will be made that the facilities are not *sufficient.* Several years after the establishment of Norman station, a little settlement called EMMONS, sprung up on the Minnesota side of the line. This little village was immediately north of the state line, and adjoining it; so that the state line was also the boundary line between the two villages.

The distance from the *station* at Norman, to the corporate limits of Emmons, by rail, is but fifty-six one-hundredths of a mile; *a trifle over half a mile.*

The distance from Norman station to the *business center* of Emmons, by rail, is but seventy-seven one-hundredths of of one mile; *a trifle more than three-quarters of a mile. Record, page 39, folio 57.*

By wagon road, the distance from Norman station to the business center of Emmons, is ninety-three one-hundredths of a mile. *Record, page 39, folio 57.*

To accommodate the people of Emmons, the plaintiff in error built a spur track, so that all car-load business for Emmons, is handled on this spur track, to and from the Norman yard. *Record, page 40.*

The first station north of Norman, is Twin Lakes, Minnesota; distant but six and fifty-four one-hundredths of a mile from Norman. The first station south of Norman, is Lake Mills, Iowa; distant five and seven-tenths miles from Norman, and twelve, and twelve one-hundredths miles, from Twin Lakes, within which last named distance, the *three stations* are situated.

The plaintiff in error refused to establish an additional station at Emmons, less than a mile from the existing station of Norman, and prior to June 1899, the citizens of Emmons caused a mandamus proceeding to be instituted by the

State of Minnesota ex rel. the Railroad and Warehouse Commissioners, to compel plaintiff in error to establish and maintain such station. The application for the mandamus was based upon two grounds; First: Upon a statute of Minnesota which requires "all railroad corporations or companies operating railroads in the state, to provide passenger and freight stations at all villages and boroughs on their respective roads;" and, second: Upon the power of the Commissioners under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot at any place, *incorporated or unincorporated* where public necessity or convenience reasonably requires it to be done.

Upon trial of the mandamus proceeding in the District Court of Freeborn County, Minnesota, judgment was given for the relator and against the plaintiff in error.

On appeal to the State Supreme Court the judgment of the District Court was reversed; and all the issues decided in favor of the plaintiff in error. Although a new trial was ordered, no new trial was taken or asked for by the relator.

By the decision of the State Supreme Court in the proceeding referred to, it was adjudicated: First: That the contention of the state, that the statute requiring railroad companies to maintain stations "at all villages and boroughs on their respective roads" was not applicable to the case, because Emmons was not at that time, incorporated; and that the word "village" as used in the statute, means an "incorporated village" and the word "borough" means an "incorporated municipality." For these technical reasons, it was held that the statute had no application. The reason for inviting attention to this fact will appear later.

The State Supreme Court held however, that under the general Railroad and Warehouse Commission Act, and without reference to statute referred to, the state had full power to require the establishment and maintenance of suitable passenger and freight stations at any place "incorporated and unincorporated," where public necessity or convenience requires it to be done. Having thus held, the Court proceeded to examine and decide the case upon the merits. The opinion, which will be found in *76 Minnesota*, pages 472 to 480, is as follows:

First Opinion of the State Supreme Court.

"MITCHELL, J.

The railroad and warehouse commissioners, upon the petition of numerous citizens, and after a hearing at which the railway company appeared and opposed the granting of the petition, made an order requiring the Minneapolis & St. Louis Railroad Company to build and maintain at Emmons, a small, unincorporated village on the line of its road, a station house for the convenience of the public, the outside measurement of which should be 16 feet by 44 feet, and which should contain a waiting room, of the width of the building, and at least 18 feet long, and suitably lighted and heated, for the accommodation of the traveling public, with suitable platforms for the purpose aforesaid, and that the same should thereafter be maintained as a regular station house of the company. The railway company having refused to comply with the order, the state, on the relation of the commissioners, applied to the district court for a writ of mandamus to compel it to do so. The railway company appeared and answered to the alternative writ of mandamus. Upon the trial the only evidence introduced by the state was the findings of the railroad and warehouse commissioners. The railway company introduced no evidence. The court found, as a conclusion of law, that the relators were entitled to a peremptory writ of mandamus compelling the railway company forthwith to comply with the order of the commissioners, and from the judgment entered accordingly it appealed to this court.

It becomes important, at the outset, to determine whether this action, and the order sought to be enforced by it, are based upon the provisions of Laws 1897, c. 94, or upon the powers granted to the railroad and warehouse commissioners by the general railroad and warehouse commission act (G. S. 1894, c. 6, tit. 9), and particularly section 388. This depends upon the construction to be given to the word 'village,' as used in the act of 1897. That act provides

> 'That all railroad corporations or companies operating any railroads in this state shall * * * provide at all villages and boroughs on their respective roads, depots with suitable waiting rooms for the protection and accommodation of all passengers patronizing such roads, and a freight room for the storage and protection of freight, * * * Such railroad corporations or companies shall at all such depots or stations stop their trains regularly as at other stations to receive and dis-

charge passengers, and, for at least one half hour before the arrival, and one half hour after the arrival, of any passenger train, cause their respective depots or waiting rooms to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid.'

While the word 'village' is often used to apply to any small assemblage of houses for dwelling or business, or both, in the country, whether incorporated or unincorporated, yet we are satisfied that the word, as used in this statute, applies exclusively to incorporated villages. In the first place, the maxim, 'Noscitur a sociis,' applies. The word 'village' is used in connection with the word 'borough,' which is never applied to any place except an incorporated municipality. See title 'Borough,' 4 Am. & Eng. Enc. (2d Ed.). We have several boroughs created by special charter in the early history of the territory and state, the name having been evidently borrowed from some of the eastern, middle or border states, such as Pennsylvania, where it is in common use. In the second place, the duties imposed on railroad companies by this act are mandatory, apply to all villages, and are imposed by the legislature itself, and not left to the discretion of the railroad and warehouse commissioners, according as they may or may not determine that public necessity or convenience requires a passenger or freight station to be provided at a particular village. Hence, if the word 'village,' in this act, is to be given its general popular meaning, as contended for by counsel for the relators, it would be the absolute duty of a railroad company to provide and maintain such a station at every little hamlet along its line, without regard to its size or the amount of its business, and without regard to its proximity to other stations, or to the necessities or convenience of the public. *It is not to be lightly assumed that the legislature intended to impose any such onerous and unreasonable duties upon railroad companies. Indeed, it is more than doubtful whether any such act could be upheld as a legitimate exercise of the police power of the state.*

If the statute is limited to incorporated villages, the duties imposed are still sufficiently onerous, yet they could be said to have *some* reference to public convenience; for, to authorize the incorporation of a village, there must be at least 175 inhabitants in a compact and contiguous tract of territory, urban and semiurban, and not strictly rural in its character. G. S. 1894, § 1200; State v. Minnetonka Village, 57 Minn. 526, 59 N. W. 972. And, lastly, if the statute is

construed as applying to all villages, in the popular sense, whether incorporated or unincorporated, there is no definite rule by which to determine to what place this mandatory duty of providing a depot and station applies. Who is to determine whether a given place has ceased to be strictly rural, and has become so far urban or semiurban in its character as to be entitled to be called a village, even in the general and popular meaning of that word? The railroad and warehouse commissioners themselves are evidently of opinion that the statute applies only to incorporated villages, and we have no doubt that in this they are correct.

2. But there is no doubt of the power of the commissioners, under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot and passenger waiting room at any place, incorporated or unincorporated, where *public necessity* or *convenience, reasonably* requires it to be done. *But this power is neither absolute nor arbitrary.* The facts must be such, having regard to the interests, not only of the particular locality, but also of the public at large *and of the railroad company itself*, as to justify the commissioners, in the exercise of a reasonable discretion and judgment, in ordering the railway company to provide a depot and passenger station at the place in question. Counsel for the relators admit this. The only evidence being the report of the commissioners themselves, we must refer to it to ascertain whether the facts therein stated reasonably justified their order requiring the railroad company to provide and maintain a depot and station at Emmons. The statute provides that,

> 'Upon the trial of said cause [before the court, as in this case, to enforce the order of the commissioners] the findings of fact of said commission as set forth in its report shall be prima facie evidence of the matters therein stated.' G. S. 1894, § 399.

The power of the legislature to establish this rule of evidence is so well settled that we deem it unnecessary to occupy time in argument, or the citation of authorities, in support of the proposition. It will be noted that it is the facts found by the commissioners, and not the conclusions which they draw from those facts, which are made prima facie evidence.

The facts found by the commissioners are, in substance, as follows:

First. That Emmons is on the line of the appellant's road, near the Iowa line, and has a population of about one

hundred. It has three stocks of general merchandise, two hardware stores, three blacksmith shops, two restaurants, one furniture store, one drug store, one lumber and coal yard, one grain elevator, one feed mill, one creamery, one butcher shop, one livery stable, and 14 or more dwelling houses; and tributary thereto is a rich and populous agricultural country, which extends to a distance of 15 or 16 miles in a westerly direction, and 5 or 6 miles in other directions. That it is 5 7-10 miles from Emmons to the first railroad station on the line of said railroad north of it, and there is no station on the line of said railroad south of Emmons within the state of Minnesota. That there is a station called 'Norman,' in the state of Iowa, 7-10 of a mile by rail, and one mile by wagon road, from Emmons; but said Norman, being within the state of Iowa, is not subject to the jurisdiction or control of this commission.

Second. That the respondent has built and maintains a spur track at Emmons for the reception and delivery of freight in carload lots, but that all business transacted by the people of Emmons, and of the country tributary thereto, with said railroad company, other than loading and unloading car-load freight, under existing conditions, is necessarily to be transacted at Norman; and in consequence thereof the people of Emmons are subjected to much inconvenience, expense and annoyance, and are required to go without the state of Minnesota, into the state of Iowa, for the transaction of such business.

Third. That during the year ending December 31, 1896, there was shipped from Emmons, on said railroad, butter, on which freight charges were collected amounting to $2,004.69; 101 car loads of grain, on which freight charges were collected amounting to $5,552.88; 74 car loads of live stock, on which freight charges were collected amounting to $3,153.45; three car loads of hay, on which freight charges were collected amounting to $97; and one car load of emigrants' movables, on which freight charges were collected amounting to $16.62,—making the total collection of freight charges on out-going freight during said time $10,824.64. That during the same period there was shipped to Emmons merchandise, in less than car loads, on which freight charges were collected amounting to $1,199.42; 42 car loads of lumber, on which freight charges were collected amounting to $1,929.24; 33 car loads of coal, on which freight charges were collected amounting to $1,237.58; three car loads of salt, on which freight charges were collected amounting to $186.80; one car load of farm machinery, on which freight charges were collected amounting to $47.70; one car load of wire and nails,

on which freight charges were collected amounting to $84.64; two car loads of stone, on which freight charges were collected amounting to $54.62,—making the total collection of freight charges on incoming freight during said period $4,689.80, and a total of freight charges collected on incoming and outgoing freight during said period of $15,514.44.

'That figures were not furnished this commission for the business of 1897, except on grain shipments up to the time of the hearing, which amounted to 178 car loads, from which we estimate, and so find, that the freight charges for the year 1897 *on incoming and outgoing freight at Emmons exceeded $20,000.* We are unable to find the receipts of the railroad company upon passenger business at Emmons, for the reason that, under existing conditions at Emmons, passengers, either incoming or outgoing, are required to take the cars or alight therefrom at Norman.'

What follows consists merely of inferences and conclusions drawn from these facts.

It is apparent from this that the surrounding country is strictly rural and agricultural, although, as the commissioners say, rich and prosperous; also, that the existing stations on appellant's road (Norman) south and (Twin Lakes) north of Emmons are only 6 4-10 miles apart, which the courts will take judicial notice is not greater than the ordinary distance between stations in the rural and agricultural portions of this state. *There is no finding that the facilities at the station of Norman for both freight and passenger traffic are not ample for the accommodation of the public.*

The only objections found against it (Norman) are that it is just over the line in the state of Iowa, and hence not subject to the jurisdiction of the relators, and that the people of Emmons and vicinity are compelled to go into the state of Iowa for the purpose of transacting business with the railroad,—*considerations which, in our judgment, are not entitled to a particle of weight.* It may be unfortunate for Norman that it is not in this state, so as to be subject to the jurisdiction of our railway and warehouse commission; but Iowa is generally supposed to be a civilized state, whose laws provide security for life and property as effectually as our own, and which exercises as efficient police power over common carriers as Minnesota. In trade and commerce, state lines go for nothing. A citizen of Minnesota who goes into Iowa is still in his own country, and has to pay neither a poll tax to enter, nor an import or export tax on his property. It is

commendable in citizens of Minnesota to attempt to build up their own state in every proper way. It is also a commendable ambition on the part of the inhabitants of Emmons to benefit their own village, and themselves individually. But this is no reason why these things should be done at the expense either of the appellant or the public at large. If any such narrow, provincial policy should obtain, every state line in the country would be flanked by double stations at every point where a railroad crossed it.

The suggestion that the station at Norman may be discontinued is frivolous. It will be time enough to take that into account when it happens. *It appears that the station at that place is only one mile by wagon road from Emmons. We will take notice that this is shorter than the distance between the dwellings or places of business of a large part of the inhabitants of our larger cities and the railway passenger or freight stations which accommodate them; also, that it is as short as or shorter than the distance between many country depots or stations and the nucleus of buildings constituting the business center of the station village.* There is no suggestion that there are any special physical obstacles or difficulties in the way of traveling the one mile of highway between Emmons and Norman. Neither is there any claim that, in locating its stations at Twin Lakes and Norman, the railroad company acted arbitrarily, unreasonably, or in disregard of the convenience of the public.

The aggregate of freight charges on freight going to or from Emmons during a year was $15,514, which at first sight seems like quite a large sum; but, when it is considered that this presumably includes the total freight charges from the places of shipment to the places of consignment, it is apparent that the gross earnings of the appellant on this freight must be a very much less sum, and its net earnings a still much smaller sum. It is also to be observed that the great bulk of this freight, representing at least $12,360 out of the $15,514 freight charges, was shipped in or out in car-load lots which was already amply accommodated by a side track at Emmons, thus leaving freight representing only $3,154 of the freight charges (assuming that the item of butter was shipped out in less than car-load lots) which will be benefited by the establishment of a regular depot or station at Emmons. And, when the nature of the freight shipped in car-load lots is taken into account, it doubtless represents a considerably greater proportion of the bulk or weight of the total freight than is indicated by its proportionate share of the freight charges. The commissioners report that they were unable for a very good reason, to ascertain what the

receipts of the appellant upon passenger business at Emmons were or would be; but it is evident that it would be inconsiderable from the village itself, and comparatively small even including the rural population of the so-called "tributary territory," especially in view of the fact that much of this must be approximately equi-distant from one or the other of the two neighboring existing stations and Emmons.

Our conclusion is that these facts did not justify the commissioners in the first instance, or the district court on appeal, in ordering the appellant to provide and maintain this station within seven-tenths of a mile of an existing station; that in the light of the facts, the order was unreasonable.

We are firm believers in the existence as well as the exercise of the police power on the part of the state over common carriers, *but this power must be exercised reasonably. Every attempt to exercise it unreasonably only injures public interests, by bringing the police power of the state into disrepute. The undue multiplication of railway stations does not increase the traffic either passenger or freight. It simply divides the existing traffic among more places. It unnecessarily increases the expense of doing the business (which comes out of the railroad company in the first instance, but at last out of the public,) diminishes the quality of the service of the road to the public by the unnecessary frequency of the stops of trains, and increases to some extent the hazards of railroad traffic and travel.* As already suggested, in determining whether a station should be provided and maintained at a particular place, the interests, *not merely of that immediate locality, but also of the railroad company, and especially of the public at large,* must be taken into consideration. It seems to us that the commissioners, in making this order, must have been unconsciously influenced by the fact that the station at Norman was on the other side of the state line, *and that, if it had been on this side, they would never have ordered the appellant to provide another station within seven-tenths of a mile of it.*

Judgment reversed, and a new trial granted."

I have quoted the opinion in full, in order that this court may see that the facts as stated therein, are, so far as they furnish reasons to support that decision, equally controlling in the case at bar.

The relator, The Railroad and Warehouse Commission did not avail itself of the new trial granted by the State Supreme Court, under the Minnesota practice, but permitted the proceeding to lapse; but, in October, 1901, upon a second

petition of citizens of Emmons, it made a second order requiring the plaintiff in error to establish and maintain the station. In the interim, the village of Emmons was incorporated, thus removing the technical objection. The Railroad Company failing to comply with the order, the present mandamus proceeding was instituted.

The petition for the temporary writ of mandamus states the official capacity of the relators, and their authority; the corporate existence of the plaintiff in error, the location of its line of road, the existence of Emmons, and the fact that it has no depot; that there is, at that point, a suitable location for a depot, and that the business of Emmons exceeds $12,000 per annum.

It also recites the fact that the order of the Commission, by which the Railroad Company was directed to build the depot, has not been complied with, and prays for the issuance of the writ. It does not state that the citizens of Emmons are not supplied with adequate *railroad* facilities, but only states that the "defendant's railroad has no *station* facilities whatever, *at said village of Emmons.*" *See pages 8, 9 and 10, Printed Record.*

The answer to the petition for the alternative writ, and the return to the writ, sets out the facts hereinbefore stated, as to the relative location of the stations of Twin Lakes, Norman and Lake Mills. It recites the establishment and maintenance of Norman station, pursuant to the contract under which the tax was voted for the construction of the railroad; alleges the sufficiency of the railroad facilities supplied by the existence of the station and yard tracks at Norman and the spur track connecting Emmons with the Norman yard, upon which all the car-load business of Emmons is handled, and alleges further that the laws of Minnesota under which the proceeding is instituted, is as applied to the facts in this case, violative of the Federal Constitution in that it denies the plaintiff in error the right to reasonably manage or control its own business; it takes its property arbitrarily and unnecessarily, for public use, without just compensation; it deprives the plaintiff in error of its pro-

perty without due process of law, and denies it the equal protection of the laws.

Upon the appeal from the judgment of the District Court, to the Supreme Court of the state, that tribunal handed down the following opinion, found at page 65 of the Printed Record:

Second Opinion of State Supreme Court.

"PER CURIAM.

This is the second attempt on the part of the citizens of the village of Emmons, situated on defendant's line of road, to secure a depot building for the accommodation of the people residing there and in that vicinity.

Their first was in the year 1897, when they proceeded by petition to the railroad and warehouse commissioners, upon which a hearing was had, and an order filed requiring the defendant company to build and maintain a depot within a prescribed time. It refused to comply with this order, and the state, on the relation of the commissioners, sought to compel obedience by mandamus. On the trial the court below found against the company, and from a judgment, subsequently entered, an appeal was taken to this court, where the judgment was reversed, and a new trial granted. 76 Minn. 469, 79 N. W. 510, wherein the facts are stated. We assume that this proceeding was abandoned, because in 1901 another was instituted of the same character and for the same purpose. After a hearing the commissioners made a second order, requiring the building and maintenance of the station house or depot as prayed for, and, as before, the railway company refused to obey. Thereupon another mandamus proceeding was instituted in the district court. The present appeal is from a judgment entered therein, commanding the railroad company to build and maintain a station house or depot upon a certain described tract of land within the village, which became incorporated under the provisions of G. S. 1894, § 1200, just prior to the commencement of this action.

Associate Justice LOVELY, having been of counsel for the village in the former proceeding, was disqualified from sitting at the hearing of this appeal, and the cause was necessarily argued and submitted to the four remaining members of the court.

We assume that Laws 1901, c. 270, which in express terms requires railway companies to build and maintain

depots or station houses in all villages through which their roads may pass, is in itself valid legislation, and not open to the objection that it is not within the legislative power to enact such a law. With this assumption no dispute has arisen over a construction of the act, to the effect that all incorporated villages within this state located on railway lines are prima facie entitled to depots. The commissioners have the power to order the erection and maintenance of depot buildings unless it is made to appear that such an order would be so unreasonable in its terms as to actually result in depriving the company proceeded against of its property without due process of law. The change made by the statute of 1901 simply affects or shifts the burden of proof, for prior to its enactment the burden was on the municipality to establish the reasonableness and necessity of a depot therein, while now a railroad company appearing before the commissioners, or trying its case on appeal to the district court, bears the burden of showing that such a requirement is not called for, and that the building and maintenance of a depot in the village is unnecessary and unreasonable.

But while agreeing as to this interpretation of the law, we fail to reach the same conclusion in respect to the facts. We do not question the correctness of the conclusion reached when considering the former appeal. But two members of the court, Chief Justice START and Associate Justice BROWN, are of the opinion that from the evidence it appears that there has since been a substantial growth in the village,—a growth which makes an altogether different showing,—and that the company did not overcome the prima facie case arising by virtue of the statute, and therefore that the judgment appealed from should be affirmed. Associate Justices COLLINS and LEWIS are unable to agree to this. Their conclusion is that the testimony fails to show that there has been a real or substantial change in the village, its needs or necessities, that the situation is practically as it was when the former proceeding was considered, and that the prima facie case made by the village has been wholly overcome by the defendant company.

With this difference of opinion, the judgment appealed from must be, and hereby is, affirmed."

Before taking up the argument, I will briefly call attention to the evidence taken upon the hearing in the District Court, for the double purpose of showing that the situation *as to all material facts* was identical with the situation exist-

ing at the time of the first trial, and that the Supreme Court of Minnesota has, in fact, held the law, as applied to the facts in this case, to be unreasonable, unconstitutional and void. Also, that that decision has never been overruled except by the decision of an inferior court.

The Following Facts are Established by Undisputed Evidence.

The village of Emmons is situated upon the present line of the Minneapolis and St. Louis Railroad, the corporate limits of the village extending to the south line of the state. The distance from the business center of the village to the depot at Norman, a regular station, upon the same railroad, is but three-fourths of one mile measured along the railroad. *Record, page 39, folio 57.*

Measured along the wagon road the distance is less than one mile. *Record, page 21 folio 25, also page 39, folio 57.*

The distance from Norman to Twin Lakes, the first station north, is six and fifty-four one-hundredths miles; and from Norman to Lake Mills, the first station south, the distance is six and fifty-four one-hundredths miles; so that, leaving Emmons out of the case, there are three stations within twelve and twelve one-hundredths miles; a little more than six miles apart, a distance of which the court says, it "will take judicial notice, is not greater than the ordinary distance between stations in the rural and agricultural portions of this state." *See 76 Minn., 477; page 9, this brief.*

The station of Norman was established many years ago, under a contract, pursuant to which a tax was voted to aid in the construction of the railroad. The station was established when the road was built, and has ever since been maintained at its original location. *Page 58, folio 91, Printed Record.*

The order of the commission requires the establishment and maintenance of an additional station at Emmons, at a point which will be about one-half mile from the railroad, if a contemplated and necessary change in its alignment, is made. This change is made necessary by the existence of a series of dangerous curves and a heavy grade, in the present track, between the stations of Twin Lakes and Norman.

These curves, together with the proposed change in the line, are shown upon Exhibit No. 3, on file with the clerk of this court. The present grade is one per cent. By the proposed alteration the curvature is reduced from 216 degrees, 17 minutes, to 25 degrees, 17 minutes; replacing a series of dangerous reverse curves, by a simple "one degree" curve; reducing the maximum grade from one per cent., to six-tenths of one per cent., and shortening the line several hundred feet. Surveys and estimates for this change are already made. The proposed change in alignment is necessary. *See testimony of Civil Engineer* W. D. WHEELER, *pages 43-44, and testimony of Superintendent* A. P. TANNER, *pages 57-58.* This testimony is uncontradicted. An examination of the exhibit referred to, will enable the court to understand the situation at a glance. Enforcement of the order of the commission will make this necessary improvement impossible, or compel the construction of a station which will be useless and worthless when the change in alignment is made.

The corporate limits of Emmons, include eight hundred acres of land, upon which there are but fifty houses, including both business houses and dwellings. The population of this tract of eight hundred acres, does not exceed two hundred and fifty people. *Printed Record, page 34, folio 48; page 41, folio 60.*

At Norman, the plaintiff in error has a yard and station, which furnish ample facilities for all the business at that point, *including the business of Emmons.* There is a spur track at Emmons upon which all the carload traffic to and from that village is handled. *See page 40, Printed Record.* The exhibit referred to, which shows this spur track, is filed with the clerk of this court.

The switching of cars thereon, is done by the engines hauling the trains which stop at Norman; the cars being handled in the Norman yard. As to *car load* shipments, all the requirements of Emmons are met by this spur track, which furnishes the same accommodations which would be supplied by the establishment of a station, viz: the opportunity to load and unload grain, stock and all car load shipments directly into and from the car.

This car load business includes nearly all the business of the village.

The evidence upon this point, which is undisputed, will be found at pages 37 and 38 of the Printed Record, and is, for convenience, divided into "freight forwarded" from Emmons, and "freight received" at Emmons.

FREIGHT FORWARDED.

The evidence shows that the total charges upon all freight shipped from Emmons during the fiscal year was $12,798.34, of which $10,401 was derived from car load shipments; leaving only $2,397.34 to represent earnings on all shipments from Emmons, handled in less than car load lots. Of the total earnings on freight forwarded ($12,798,34), but $8,813.-04 was earned by the plaintiff in error, and was divided as follows: On car loads, $7,748.70; in less than carloads, $1,064.34. This latter sum ($1,064.34) represents the total earnings of the plaintiff in error, at Emmons, on freight forwarded from that village other than in car loads. The balance, in excess of $8,813.04, was earned by other carriers.

FREIGHT RECEIVED.

The total charges upon all freight received at Emmons during the year amounted to $7,547.62, of which $5,409.29 was upon car loads, and but $2,183.33 on less than car load shipments. Of this total charge upon "freight received" the plaintiff in error's earnings were $4,789.16, the balance being earned upon other lines of railroad.

Of the $4,789.16 earned by the plaintiff in error, $3,058.73 was upon carloads, and but $1,730.43, on less than car loads.

RECAPITULATION.

To recapitulate and tabulate the evidence, the record is as follows:

Total earnings *of all carriers*, on business to and from Emmons during the fiscal year:

Freight forwarded	$12,798.34
Freight received	7,547.62
Total	$20,345.96

This is made up of Earnings on car loads:

Freight forwarded	$10,401.00	
Freight received	5,409.29	
		$15,810.29

Earnings on less than car loads:

Freight forwarded	$2,397.34	
Freight received	2,138.33	
		$ 4,535.67
		$20,345.96

Of this sum of $4,535.67, *which represents the total earnings on shipments, in less than car loads*, the plaintiff in error earned but $2,794.77, as follows:

Freight forwarded	$1,064.34	
Freight received	1,730.43	
		$ 2,794.77

The remainder was earned by connecting lines.

This sum, $2,794.77, represents the *total business* of Emmons, not already accommodated by the side track, which furnishes the same terminal facilities which would be afforded for car load business, if a station were built; as car load business is never handled through the depot.

This sum ($2,794.77) also represents the GROSS earnings of the plaintiff in error on all its business at Emmons, except car load business, which is fully accommodated by the side track already built,

The point at which the plaintiff in error is required to construct the proposed station, is, upon its maximum grade—one per cent. This grade would make it impossible to start a maximum train, going north, after it came to a stop at the proposed station. *Record, page 42; also pages 56-57.*

The actual cost of the construction of a standard yard at Emmons, with a depot building of the character constructed by the plaintiff in error at all stations of that class, including the necessary grading, tracks, switches, and ordinary instrumentalities, would be $14,265. It would cost, to maintain the station, between $900 and $1,000 per annum.

Norman has thirteen business houses, a depot building 30 by 50 feet, and ample railroad facilities. The road from Emmons to Norman is an ordinary country road; and is, in the spring, muddy, and, for a few days, impassable, so that travelers have to go through the fields.

THE ISSUES.

It is claimed by the Relator, that the State, acting through its Railroad and Warehouse Commission, has full power and authority to establish the station as prayed.

First. Under the provisions of the general railroad and warehouse commission act; Chap. 6, Title 9, Gen. Stat. 1894; particularly Sec. 388.

Second. Under the provisions of Chap. 270, Gen. Laws of 1901.

The Plaintiff in Error says, that, under the existing conditions, as disclosed and established by the undisputed evidence, the establishment and maintenance of a station, at Emmons, is wholly unnecessary; the requirement of the commission, unjust, unreasonable and unwarranted.

It says further, that any, and all laws of this state, including the acts hereinbefore specified, which require the establishment, and maintenance, of stations without regard to the location or situation of the villages or boroughs at which they are to be established and maintained, and without regard to existing conditions, are unjust, unreasonable, contrary to public policy, and void; and are violative of both state and federal constitutions.

Said laws and statutes deny to the Plaintiff in Error the right to reasonably manage, and control' its own business; and take its property without its consent. They authorize the taking of its property, arbitrarily and unnecessarily for public use, without just compensation.

She said laws, and statutes, deprive the Plaintiff in Error of its property without due process of law; and assume to authorize the taking thereof, without due process of law; and by the enactment and enforcement of said statute it is denied the equal protection of the laws; all of which is in violation of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

The Supreme Court of the state, by a decision which has not been overruled, modified or criticised, has, in no measured terms, placed the seal of its disapproval upon the attempt to compel the plaintiff in error to establish and maintain a station at Emmons. The decision was not limited to the technical questions involved, but was broad, comprehensive, and upon the merits. In the former proceeding the relator attempted to justify its order for the establishment of the station, under two statutes, viz: (1) Under the section 388, Gen. Stat. of 1894, and (2) under chapter 94, Gen. Laws of 1897.

Sec. 388, Gen. Statutes of 1894, is that section of the general railroad and warehouse commission act which defines the powers and duties of the commission. It undoubtedly confers ample power and authority upon that body, to require the establishment and maintenance of stations, in proper cases, and this court so held; but also held that this was not a proper case.

Chapter 94, Gen. Laws of 1897, reads as follows:

SEC. 1. All railroad corporations, or companies, operating any railroads in this state, shall, within a reasonable time after the passage and approval of this act, provide at all villages, and boroughs, on their respective roads, depots, with suitable waiting rooms, for the protection and accommodation of all passengers patronizing such roads, and a freight room for the storage and protection of freight, and at all stations in villages of one thousand (1,000) inhabitants or over, all such railroad companies, or corporations, shall provide a separate waiting room for ladies, and a separate waiting room for gentlemen, both of which said waiting rooms shall be properly and comfortably furnished, heated, lighted and ventilated, which said rooms shall each be at

least equal in size to fifteen (15) feet by eighteen (18) feet square, with a height of ceiling at least ten (10) feet above the floor; and that all villages of less than one thousand (1,000) shall have at least one (1) such waiting room; and waiting rooms in all cases, when necessary, shall be constructed of such greater size as to accommodate all passengers patronizing such railroad at any station.

Such railroad corporations or companies shall, at all such depots or stations, stop their trains regularly, as at other stations, to receive and discharge passengers; and for at least one-half (½) hour before the arrival and one-half (½) hour after the arrival of any passenger train, cause their respective depots or waiting rooms to be kept open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid. And where the annual business of any railroad company at any such station amounts to fifteen thousand dollars ($15,000) or more, based upon the outgoing and incoming freight and passenger traffic, then such railway company shall keep an agent at said depot during the business hours of each business day during the entire year; and any railroad company violating the provisions of this act shall be subject to the penalty as provided in section two (2) of chapter one hundred and ninety (190) of the general laws for the year one thousand eight hundred and eighty-five (1885.)

Provided, That the Railroad and Warehouse Commission may authorize the withdrawal of such agent at depots where the business is periodical, during such time as there is no business at any such station.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved April 3, 1897.

The above chapter was re-enacted by the general assembly of 1901, as chapter 270, General Laws of 1901, with the following changes:

The provision that where the annual business of the station amounts to $15,000, an agent shall be at the depot during the business hours of each day, is amended by substituting the sum of $8,000 for the sum first named, and adding the words, "except at stations where receipts from outgoing and incoming freight and passenger traffic for any consecutive three months shall not amount to fifteen hundred ($1,500) dollars."

These wholly unimportant amendments, together with

the subsequent incorporation of the village, seem to be the basis for this proceeding; the evident purpose of which is to secure a rehearing of the case upon the same facts, so far as the case of the relator is concerned, and to induce this court to overrule its decision, without any meritorious or substantial reason.

Upon the former trial, the plaintiff in error urged the objection, that chapter 94, General Laws of 1897, if valid, had no application; it being, in terms, limited to "villages" and "boroughs." That the word "village," when used in a statute, means an *incorporated* village, and that a "borough" is an incorporated village. This contention was sustained by this court; and, to meet this contention, Emmons has since been incorporated. In view of the fact that this objection was technical, and did not go to the merits of the controversy, this court, upon the former appeal, proceeded to determine the case *upon the merits;* it being urged by the relator that its order was justified by the general railroad and warehouse commission act; section 388, Gen. Stat. 1894.

Construing the act of 1897, the court held that Emmons was neither a statutory village nor a borough; and in defining a "borough" took occasion to say, at 76 Minnesota, page 474, that "It is not to be lightly assumed that the legislature intended to impose any such onerous and UNREASONABLE duties upon railroad companies." After denying the authority of the commission to make the order under chapter 94 of laws of 1897, it was held that the general railroad and warehouse commission act confers upon the commission, authority to require a railroad company to provide a suitable depot-building at any place, *whether incorporated or unincorporated*, where public necessity or convenience REASONABLY requires it to be done. Under this general law, the court proceeded to examine into the necessity for a depot at Emmons; and in clear, forcible and comprehensive language, held the requirement to be wholly unreasonable. The right to the establishment of this proposed station, under authority of the general railroad and warehouse commission statute, is adjudicated in favor of the appellant. By such adjudication, it is determined that it is not reasonably required by public necessity,

or convenience. It is held (1)—That the general railroad and warehouse commission act confers jurisdiction upon the commission, to require the construction of stations when public necessity, or convenience reasonably requires it; (2)—That public necessity and convenience do *not* reasonably require the construction of a station at Emmons. It follows, therefore, that the chapter 270, Gen. Laws of 1901, *as applied to this case*, requires the construction of a station, at a point where it is not reasonably required by public necessity, or convenience. Counsel for the relator, in this proceeding, based his argument in the trial court both upon the general railroad and warehouse commission act (particularly, Sec. 388, G. S. 1894), and upon chapter 270, laws of 1901.

In order to find support for the order under the general act (Sec. 388, G. S. 1894), the relator must show a reasonable public necessity for the station; and in determining whether such necessity exists, as was said by Justice Mitchell, (76 Minn. 475), regard must be had to the interests "not only of the particular locality, but also of the public at large, and of the railroad company." Every conceivable argument which can be made in support of the order of the commission, in this proceeding, is conclusively answered by the able and comprehensive opinion of Mr. Justice Mitchell, upon the former trial. Referring to the argument that Norman station is in Iowa, he says, at pages 477-478:

"The only objections found against it (Norman) are that it is just over the line in the state of Iowa, and hence not subject to the jurisdiction of the relators; and that the people of Emmons and vicinity are compelled to go into the state of Iowa for the purpose of transacting business with the railroad, *considerations which, in our judgment, are not entitled to a particle of weight.* It may be unfortunate for Norman that it is not in this state, so as to be subject to the jurisdiction of our railway and warehouse commission, but Iowa is generally supposed to be a civilized state, whose laws provide security for life and property as effectually as our own, and which exercises as efficient police power over common carriers as Minnesota. *In trade and commerce, state lines go for nothing.* A citizen of Minnesota who goes into Iowa is still in his own country, and has to pay neither a poll tax to enter, nor an import or export tax on his property. It is

commendable in citizens of Minnesota to attempt to build up their own state in every proper way. It is also a commendable ambition on the part of the inhabitants of Emmons to benefit their own village, and themselves individually. But this is no reason why these things should be done at the expense, either of the appellant, or the public at large. *If any such narrow, provincial policy should obtain, every state line in the country would be flanked by double stations at every point where a railroad crossed it.*

The suggestion that the station at Norman may be discontinued, is frivolous. It will be time enough to take that into account when it happens. It appears that the station at that place is only one mile by wagon road from Emmons. *We will take notice that this is shorter than the distance between the dwellings or places of business of a large part of the inhabitants of our larger cities and the railway passenger or freight stations which accommodate them; also, that it is as short as, or shorter than the distance between many country depots or stations and the nucleus of buildings constituting the business center of the station village.* There is no suggestion that there are any special physical obstacles, or difficulties, in the way of traveling the one mile of highway between Emmons and Norman. Neither is there any claim that, in locating its stations at Twin Lakes and Norman the railroad company acted arbitrarily, unreasonably, or in disregard of the convenience of the public."

Again at pages 479-480, it is said:

"Our conclusion is, that these facts did not justify the commissioners, in the first instance, or the district court on appeal, in ordering the appellant to provide and maintain this station within seven-tenths of a mile of an existing station; *that, in the light of the facts, the order was unreasonable.*

We are firm believers in the existence as well as the exercise of the police power on the part of the state over common carriers, *but this power must be exercised reasonably. Every attempt to exercise it unreasonably only injures public interests, by bringing the police power of the state into disrepute. The undue multiplication of railway stations does not increase the traffic, either passenger or freight. It simply divides the existing traffic among more places. It unnecessarily increases the expense of doing the business (which comes out of the railroad company in the first instance, but at last usually out of the public), diminishes the quality of the service of the road to the public by the unnecessary frequency of stops of trains, and increases, to some extent, the hazards of railroad traffic and travel.*

As already suggested, in determining whether a station should be provided and maintained at a particular place, the interests, *not merely of that immediate locality, but also of the railroad company, and especially of the public at large*, must be taken into consideration. It seems to us that the commissioners, in making this order, must have been unconsciously influenced by the fact that the station at Norman was on the other side of the state line, *and that, if it had been on this side, they would never have ordered the appellant to provide another station within seven-tenths of a mile of it.*"

II.

The Decision Above Cited is the Law of the Case.

The relator has attempted to add to the statutory methods of obtaining a new trial of issues once adjudicated, by adopting the plan of having the same plaintiff bring a second suit against the same defendant, in the same court, upon the same cause of action, and, ignoring the proceedings and adjudication formerly had, proceed to try the case over again.

That the decision of the state Supreme Court, above cited, is still the unquestioned law of the state, is conceded. The only reasons advanced in support of a different conclusion, are the minor and insignificant increases in the population and business of Emmons. These so-called "changed conditions," will be considered; but the decision of the state court upon the first appeal is the law.

The decision of the state court now under review is an affirmance of the judgment of the District Court, by a divided Supreme Court. Such an affirmance does not overrule the *actual* decision. To give it that effect would be to hold that the District Court might thus overrule the Supreme Court.

An affirmance by a divided court establishes no precedent or principle.

Hanifan vs, Armitage 117 Federal Reporter 845.

In the case cited, which was in the Circuit Court for the Eastern District of Pennsylvania, the judgment of affirmance by a divided court, was ignored, and a former *decision* accepted and adhered to as the law of the case.

An affirmance by a divided court does not operate to settle the principles of law involved or have the effect of an opinion or decision.

Etting vs. the Bank of the United States, 11 Wheaton 78.
Benton vs. Windsey, 12 Peters, 27; 12 Curtis, 618.
Holmes vs. Jennison, 14 Peters, 540.

In *Morse vs. Gould*, 11 New York, 285, the Court says:

"Although the judgment of the Supreme Court * * * was affirmed *by this court*, yet, as the judges were equally divided in opinion, the determination cannot be considered as a precedent, *but the question must be regarded as entirely open.*"

The Supreme Court of Pennsylvania held *In re Griel*, 171 Penn. State, 412, that a decree of a lower court, affirmed by a divided court, is not a decree or judgment of the Supreme Court, in support of which the rule of stare decisis can be invoked.

This affirmance is not a decision. It does not commit the appellate court to an approval or acceptance of the principles of law as decided by the trial court, nor does such affirmance overrule or modify the decision in the former decision, which decision, is properly recognizable in this court.

It was held in *Lessieur vs. Price*, 12 Howard, 59, that for the purpose of determining the *jurisdiction*, and as a question of practice, the judgment of affirmance would be treated as the judgment of the court, so as to authorize the removal of the case to this court by writ of error.

The rule seems to be, that while such an affirmance is a decision of the case, it has no value as authority. Applied to the case at bar: the true decision of the Supreme Court of

Minnesota, as to the law questions involved, is found in the opinion reported at 76 Minnesota, 469 in which the requirement that two stations be established and maintained upon the same railroad, *within one mile*, is unreasonable and results in depriving the plaintiff in error of its property without due process of law.

III.

It is only where the evidence is substantially different upon the second trial, that the case is not controlled by the first decision. There is no substantial difference between the evidence in this proceeding, and that produced upon the former trial. The substantial facts, upon which the rights of the parties rest are set out in the opinion in the former case (76 Minn., 469), and the record in the present proceeding. Comparison shows no important difference in the situation.

The distance by rail, and by wagon road, between the village of Emmons and the station at Norman, is unchanged.

While there are several more houses in Emmons than there were five years ago, there has been no substantial increase in railroad business; and it is to be borne in mind also, that in mustering a population of 246 people, the whole corporate territory, comprising *eight hundred acres*, is included. All this territory has but fifty buildings of all kinds, including business houses and dwellings, while the estimate in the former proceeding was limited to the "village." The size of this little hamlet furnishes no reason for the order, as the present needs are as well met by the facilities at Norman, as at the time of the former hearing. THE RAILROAD FACILITIES AT NORMAN ARE AMPLE. THIS IS NOT DENIED. The fact that the depot is not kept open nights, furnishes no reason for the establishment of another station to divide the small passenger traffic, which is so insignificant that no evidence was offered to show its extent.

The business of Emmons has not appreciably increased since the former decision. In 1896 the total amount of charges on outgoing freight, forwarded from Emmons, was $10,824.64 (see 76 Minn., 476); in 1901 it was but $12,798.34,

Record, page 38, folio 55), less than $2,000 in excess of the year 1896. In 1896, the total charges on freight received at Emmons was $4,689.80 (see 76 Minn., page 477); in 1901 it was $7,547.62, (Record, page 37, folio 53), an increase of less than $3,000 over 1896. *But in 1897, the charges on incoming and outgoing traffic at Emmons was over $20,000 (76 Minn., 477); which is equal to the business of 1901.* But, as Justice Mitchell says, in his opinion, the great bulk of the business is shipped in, and out, in carload lots, already amply accommodated by a side track at Emmons, (page 478, opinion), leaving freight representing only $4,535.67 of the freight charges, which will be benefitted by the establishment of a regular depot or station at Emmons. Of this sum but $2,794.77 was earned by the plaintiff in error, the remainder being advance charges earned by preceding carriers.

This sum represents "gross" earnings. Its "net" earnings amount to less than twenty per cent of that sum.

The order of the commission requires an investment of $14,265 to build and equip a yard, (Record, page 44, folio 65) and an expense of from $900 to $1,000 a year to maintain the station. This showing was not made on the former trial, and as all these features are made prominent in Judge Mitchell's opinion, they greatly increase the strength of our case.

Again, if a station be put in, as required by the order, it will be impossible to start a maximum train, going north, after stopping at the new station. *Record page 42, folio 62; also page 56, folio 88.* If the appellant makes the contemplated improvement in the alignment and grade of its road between Twin Lakes and Norman, its main line will be removed a half mile from the village of Emmons. *Record, pages 42 to 44, folios 62 to 66.*

The only conditions which can be urged by the relator to avoid the effect of the former decision are:

First: The increase in population.

Second: The condition of the public road leading to Norman.

The first of these facts, the increase in population, is wholly unimportant, for several reasons. As above noted, a large part of the apparent increase is due to the fact that the former estimate included only the village proper, while the present estimate of 246 people (transcript, page 18) includes a tract of eight hundred acres. It would probably be convenient for the people who live at the north end of the incorporated village, which is more than a mile from the business center, to have still another station established for their use; and equal necessity can be shown. The needs of this village of fifty houses, thirty or thirty-five of which are dwellings (Record, page 32, folio 45), are just as fully met by the station of Norman, as were the needs of the same village, at the time of the former hearing. The village is no farther from the station than it was in 1896; and *there is no complaint of the sufficiency of the station facilities to handle all business.* It is conceded that an agent is kept at the station "during the business hours of each business day," which is all that the statute requires; the only complaint being that he is not there nights; but it does not appear that there is any night passenger traffic, or any traffic not fully accommodated by the two daylight trains, each way.

As to the muddy roads, the point is not worthy of serious, and hardly of patient consideration. A railroad company is not responsible for the condition of the roads. Nor is it under any obligation to keep them in repair.

The village of Norman was first established. Years afterwards, Emmons was built up, by people who settled there voluntarily, knowing that there was a railroad station less than a mile away, and seeing for themselves the nature of the ground and the condition of the road to the station. The proposition that a railroad company must build and maintain two stations within one mile, because the wagon road between the two points is muddy, in the spring and fall, is too frivolous to merit consideration. Within the corporate limits, which extend to the state line, Emmons can take care of her own roads. Outside the corporate limits, the large territory which is claimed to be tributory to Em-

mons, should take care of the roads. The proposition that the appellant must expend more than $14,000 to establish a station, and pay out $1,000 per annum to maintain it because the road to its present station is muddy in the spring and fall, is not one which appeals to the judgment of the average man. Six per cent. on $14,265 (the cost of the station) is $855.90; the expense of maintaining the station is not less than $900. per year; the cost of keeping the building and platform in repair is ten per cent. of its cost, or $125. per year. The cost of this station would, therefore, be $1,880. per annum. The net earnings on the present business are about $500 per annum, estimating the proportion of gross earnings to net earnings from the report made by plaintiff in error to the relator. This business is now done through Norman station. If a new station is established, *both stations must be maintained.* The cost of maintaining the present station will not be lessened; and the business, which, in its entirety, does not now pay the expense of maintaining *one* station will be be divided between *two.*

Let us look at the testimony of relator's witnesses upon which this demand is based:

Mr. Fisk says, (Record, page 21, folio 26), that the road is "very poor most times of the year." That it is muddy, low and marshy.

Mr. Martinson says: "*In the spring of the year* it is very bad, *also in the fall. At different times* it is quite bad." (Record, page 25, folio 33). At page 39 the same witness says: "Well, I mean that *in the spring of the year* it is *almost* impassable, *for a few days.* * * * It is *hard* to get through there with teams."

Mr. Emmons testified, at page 33, folio 47, of the Printed Record: "Well, *during wet and stormy weather,* it is in poor condition. * * * It is *almost* impassable. It is too soft."

Mr. Thornby says, (Record, page 35, folio 49): "There *have been times* when they couldn't pass that road, when they had to take down fences, in the spring, and drive over the property of others, to get around it."

All that this proves, is the fact that this road, like all country roads, is muddy in the spring and fall; but to claim

that this fact furnishes a sufficient reason, or *any* reason for requiring this appellant to maintain two stations within one mile, to accommodate a business insufficient to properly maintain *one*, is beyond reason. The facts *upon which the former decision rest*, are unchanged. The fact remains, as stated by Justice Mitchell in the opinion, in which he said:

"We will take notice that this is shorter than the distance between the dwellings or places of business of a large part of the inhabitants of our larger cities, and the railway, passenger or freight stations which accommodate them; also that it was as short as, or shorter than, the distance between many country depots or stations and the nucleus of business constituting the business center of station village." *(76 Minn., 478).*

III.

The Proposed Change of Alignment in the Track, Between Twin Lakes and Norman, is a Necessary and Authorized Improvement, Required by the Public Interests.

The right of the plaintiff in error to change its line in accordance with the proposed plan, submitted in evidence, is conferred by section 2750 of the General Statutes of 1894. That the proposed change would be for the public interest is manifest; that it should not be prevented, by the establishment of this station, is equally manifest.

It appears from the testimony of W. D. WHEELER that the maximum grade, to which the appellant purposes to reduce all its tracks, is six-tenths of one per cent. By reference to the plat, marked "Exhibit 3," and the testimony of Mr. Wheeler at pages 42 to 44 of the Printed Record, it will be seen that, at the point of the proposed change of alignment, there is a series of reverse curves, and a one per cent. grade. These curves constitute an exceedingly dangerous condition in operating fast passenger trains, and an exceedingly *difficult* condition in operating heavy freight trains. The aggregate of these curves, within the short distance of one mile and three-quarters north of Norman, is 216 degrees and 17 minutes. By the proposed change of alignment this curvature is reduced *four-fifths*, to 25 degrees and 17 minutes of

light curvature—a one degree, simple curve—in place of the dangerous reverse curves. The grade is reduced to a maximum of six-tenths of one per cent., and the line is nearly four hundred feet shorter. Any alteration in the line of a railway which benefits the railway company necessarily benefits the public.

As was said in *Fletcher vs. Railway Company, 67 Minn., 345-346*:

"Any change in the line, whereby the company is enabled to maintain the line at less expense, or operate it with greater safety and convenience and more economy, is, necessarily, a benefit to the public."

Surveys and estimates for this work have been made, and, if done, the village of Emmons will be one-half mile from the main track, while the stations at Norman and Twin Lakes will remain undisturbed. Emmons will still have its present side track facilities, and the appellant's track and railroad facilities will be greatly improved. I submit that it would be unreasonable to require the appellant to abandon a work of this character, involving the retention of a grade which would control and limit the size and tonnage of all trains moved upon that division, and increasing the risks and discomfort to every passenger, in order to give the citizens of this little hamlet a station within a mile of an existing station.

IV.

The Law will not Permit the Abandonment of the Station at Norman.

When the Minneapolis & St. Louis Railroad was built, the people of the township in which the station of Norman is situated voted a five per cent. tax to aid in the construction of the railroad, upon the condition that a station should be located and maintained within one mile of the northeast corner of Winnebago county, Iowa. Pursuant to such agreement Norman station was located, and has since been maintained. The removal of the station would not be permitted

and can be enjoined. To sustain the order, is to require the maintenance of two stations within one mile, while there is hardly business enough to warrant the maintenance of one.

V.

Neither Section 388, General Statutes of 1894, or Chapter 270, General Statutes of 1901, are Valid, When it is Sought to Apply their Provisions to the Facts in this Case.

Considerable space, in this brief, has been devoted to the discussion of facts which the writer hereof believes to be wholly unimportant, but as such facts furnish the only apparent reason for the failure of the state Supreme Court to follow its own decision in the case at bar, it has become necessary to give them attention, to the extent of considering their effect upon the application of the law of the case.

It is difficult to formulate any condition which will satisfactorily support the proposition that a railroad carrier can be lawfully subjected to the expense of maintaining two stations upon its road, within a distance of one mile, to accommodate the convenience—not the necessities—of an aggregate population of three hundred and fifty people. The unreasonableness of the proposition is emphasized by the fact, that the entire business of the combined municipalities is fully accommodated by the facilities already furnished; by the further fact that the entire business is scarcely sufficient to warrant the maintenance of one station, and still further, that the reasons urged for the additional station, are limited to a "muddy road" between the two small collections of houses, and personal inconvenience to the few people who go to the station to transact the small business of Emmons which is not handled in the village itself, upon the spur track, in car loads.

No complaint of the *insufficiency* of the facilities at Norman, is made, nor is there any evidence of insufficiency found in the record. The only conditions which furnish an excuse for the demand for railroad stations, to accommodate the business of this small community are (1) that the roads are muddy, and that the Emmons' end of this populous dis-

trict, has a few more houses and a few more people than the older end of the district, where the station is located. If this wholly unreasonable requirement must be performed, any railroad company doing business, can be driven into bankruptcy. The population of both towns does not equal that of a business building in a city of moderate size. The average business man walks a greater distance to go to his store or office, than the distance between the business centers of these two villages. The average distance which a traveller rides, or walks, to take his train, is greater than the distance between these two proposed stations. Nearly every merchant in town, country, or city, hauls his freight a greater distance to or from the depot than the distance between these two villages. The business of both, pays the plaintiff in error a net income scarcely sufficient to maintain one station; yet it is proposed that it should build a station for which there is no occasion, at a cost of more than $14,000, maintained at an annual expense of more than nine hundred dollars, stop its trains twice within one mile, abandon the necessary improvement in the alignment of its railroad, by which nearly two hundred degrees of dangerous reverse curvature is eliminated, and by which its grade is reduced and its line shortened, and for what? To relieve the municipality of Emmons from mending its roads so that the present depot, which lies at its door, can be reached without inconvenience to its handful of people. The proposition is unjust, unreasonable and wholly absurd. To compel the plaintiff to thus expend its money, is to take its property without due process of law.

The power of the Commission, to require the establishment and maintenance of a station, *when reasonably required by public necessity*, is conferred by the general Railroad and Warehouse Commission Act. This was decided upon the appeal in the former proceeding. It follows, necessarily, that the act of 1901, and the acts of which it is amendatory, are, and ever have been, wholly useless to confer authority in cases where the station is actually necessary. The apparent purpose of its enactment, is to enable the commission to compel railroad companies to construct stations which are not reasonably required. The act of 1901 (Chap. 270) can

have no other purpose. The act is a police regulation, pure and simple. If justifiable, it is an exercise of the police power of the state; not otherwise.

MR. COOLEY, in his work on *Constitutional Limitations, 5th Ed., page 707*, defines the police power as

"the power vested in the legislature, by the constitution, to make, ordain and establish all manner of wholesome and *reasonable* laws, statutes and ordinances, either with penalties or without, *not repugnant to the constitution.*"

The same writer says, at page 713, that police regulations

"can be such only, as are so clearly necessary to the safety, comfort, and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise."

The same language is quoted and adopted in *Black on Constitutional Prohibitions, Sec. 62.*

Again, it is said in *Cooley on Constitutional Limitations, Sec. 577:*

"The limit to the exercise of police power must be this: The regulations must have reference to the comfort, safety or wellfare of society; they must not be in conflict with any other provisions of the charter; they must not, under pretense of regulation, take from the corporation any essential rights and privileges which the charter confers. In short, they must be police regulations in fact; and not amendments of the charter, or curtailments of corporate franchises."

The fact that the establishment of a station at Emmons might be *convenient* to the public, furnishes no reason or authority for its establishment. The police power of the state does not extend to cases of public convenience; it is limited to cases of public *necessity.*

Black on Constitutional Prohibitions, Sec. 64, says:

"There is no possibility, upon any principal of logical deduction from the adjudged cases, or the nature of the subject, of stretching the limits of the police power so as to make it include matters which are merely connected with

the *convenience* of the public. There are decisions which might seem, at first blush, to lend countenance to such a proposition, but an attentive consideration will show that they neither used the term in its broad or general sense, or had reference to matters concerning the *safety* of the people, not their *convenience.*"

In the case of *State vs. Noyes, 47 Maine, 212-213,* Chief Justice Tenney says:

"The counsel for the government has called our attention to many statutes and decisions which, it is contended, look more to the public convenience than to public safety; and judging from the ability and untiring diligence manifested in his argument, we cannot doubt that authorities favoring his views would be found, if they exist. But we have been unable to discover in any of them the doctrine contended for, that legitimate police regulations will extend to matters conducive to the convenience of the public when they conflict with the recognized rights of other parties."

The exercise of the police power is subject to the limitation of the federal constitution. Many, in fact the majority of police regulations are, *prima facie,* in violation of rights, declared by the constitutions; but are upheld, because of the necessity of a reserved power, in the state, to protect the health, persons and property of the public and its individual citizens. The public power is a "reserved power." Its exercise is only justified by *reasonable necessity.* The provisions of the constitution are limitations upon the power, and, if a law be either unnecessary or unreasonable it is void; because of the constitutional limitation. A law cannot be upheld because the act which it authorizes is *convenient.* It must be a *necessity.* The police power is founded upon the maxim, "Use your own property in such a manner as not to injure that of another."

Whether a law is necessary and unreasonable, as applied to each case is a judicial question for the court; and, if unnecessary or unreasonable, the court may declare it void.

Tiedeman's Limitations of Police Power, p. 593, Sec. 194.

Evison vs. Ry. Co. 45 Minn., 373, 375.

The power of the legislature, as well as of the courts, is limited to the requirements of the community. When property is taken unnecessarily and without reason, the taking is not due process of law. That the taking is under *form* of law, does not render the act less a violation of the constitution.

Railway Company vs. Chicago, 166 U. S., 226.
Railway Company vs. Nebraska, 164 U. S., 403.
*Cooley's Const. Limitations, 5th Ed. 435, (*356.)*
County of San Mateo vs. Ry. Co., 13 Fed. Rep., 722.
Foule vs. Mann, 53 Iowa, 42.

VI.

Chapter 270, General Laws of 1901, is Void upon its Face. It is a Mandatory Statute, Providing for no Hearing; No Judicial Determination as to Whether or Not the Station is Necessary.

The act of 1901 (Chap. 270 G. L. 1901) is absolutely void. It does not make the establishment and maintenance of the proposed station, dependent upon the reasonableness of the requirement, or the necessity for the station. It is not due process of law. Its enforcement takes the appellant's property, without due process of law, and deprives it of the equal protection of the laws, and is therefore violative of the Fourteenth Amendment to the Constitution of the United States.

Railroad Company vs. Minnesota, 134 U. S., 418.

Under the act of 1901, it was the duty of the commission to make the order, without regard to the necessity, or reasonableness, of the requirement. Under the act of 1901, the appellant had no right to offer evidence of any kind or character; but the relator's counsel, realizing that, under the decision in *Railway Co. vs. Minnesota, supra*, the act is void, tried the case in the district court, upon the theory that the order was made under the general railroad and warehouse commission act.

Chapter 270, Gen. Laws of 1901, is also violative of section 10, article 1, of the constitution of the United States;

because it violates and impairs the obligation of the charter contract between the state and the plaintiff in error. This contract includes the right of the plaintiff in error to reasonably control its own property; to select, under reasonable limitations, the location of its stations; to earn a fair, and reasonable, profit and to be free from cumpulsory control, resulting in the unneccessary, and unreasonable, dissipation of its earnings in the construction and maintenance of facilities and instrumentalities of commerce, not required for the reasonable accommodation of the public needs. Any law, the enforcement of which the value of the contract is diminished, impairs its obligation.

In the case of *Bank vs. Sharp, 6 Howard, 327*, the Supreme Court of the United States says:

"One of the tests that a contract has been impaired, is that its value has, by legislation, been diminished. It is not, by the constitution, to be impaired *at all*. This is not a question of degree, or manner, or cause, but of encroaching, *in any respect*, on its obligation, dispensing with any part of its force."

The enforcement of such requirements as the one embodied in the order of the commission, by which stations may be located by compulsion less than a mile apart, is destructive of the value of the plaintiff in error's franchise and diminishes the value of its charter contract.

VII.

The construction placed upon the Act of 1901, by the state Supreme Court, has practically invalidated it. By the language of the Act itself, no room is left for judicial determination as to the necessity for the station, when demanded by the inhabitants of an incorporated village. In this proceeding, the Act is so construed as to make it meaningless, except as a declaration changing the burden of proof. The former decision of the questions here involved, which was favorable to the contention of the plaintiff in error, was placed upon the ground that the requirement of the Com-

mission was so unreasonable, that enforcement of the order would result in taking the property of the railroad company without due process of law. That this is the issue, is expressly stated in the opinion in the present proceeding. *Record, pages 65-66.* The issue presented and decided is purely a federal question. It seems a novel proposition that under any law,—any rule of evidence,—any statute,—the burden of proof should rest upon a railroad company, to show affirmatively that two stations are not required upon one mile of railroad. The burden of establishing an apparently self-evident proposition is rarely imposed by statutory enactment. A simple statement of the proposition herein involved, would seem to establish its correctness. A condition which reasonably necessitates the establishment of two railroad stations, upon the same railroad, within one mile, is so exceptional as to call for proof of the necessity. *As applied to the facts in this case,* the Act of 1901, is unreasonable and void. *As applied to the facts in this case,* any statute which assumes to authorize this wholly unreasonable order is violative of the federal constitution.

Respectfully submitted,

ALBERT E. CLARKE,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

October Term, 1908.

No. 138.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA, EX. REL. THE RAILROAD AND WAREHOUSE COMMISSION.

In Error to the Supreme Court of Minnesota.

BRIEF OF PLAINTIFF IN ERROR IN REPLY.

ALBERT E. CLARKE,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

No. 138.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA, EX. REL. THE RAILROAD AND WAREHOUSE COMMISSION.

In Error to the Supreme Court of Minnesota.

BRIEF OF PLAINTIFF IN ERROR, IN REPLY.

Brushing aside technicalities in this case, the question presented is this:

Does a judgment, by which a railroad company is required to construct and maintain two stations within one mile, upon the same line of road, to accommodate the *convenience* (not the necessities) of a total population of three hundred and fifty people, in a rural, or agricultural district, constitute a taking of property without due process of law?

Here is the whole question in a nutshell. This is the issue, as stated by the Supreme Court of Minnesota, at 87

Minnesota, page 186. The language of the state court is as follows:

"The Commissioners have the power to order the erection and maintenance of depot buildings *unless it is made to appear that such an order is so unreasonable in its terms as to actually result in depriving the company proceeded against, of its property, without due process of law.*"

This is, of necessity, a federal question.

It seems idle to consume time in discussing questions as to the "burden of proof" where the facts are undisputed.

Discussion as to whether this law is a "police regulation" is equally superfluous. A police regulation, the enforcement of which violates a constitutional enactment, is equally void with any other kind of a regulation. The present station at Norman fully meets all *necessities.* It requires something more than a muddy road or personal inconvenience to justify the state in requiring the maintenance of two stations on the same railroad, seven-tenths of one mile apart.

The power of the state to require the construction and maintenance of stations *at proper points,* is not questioned. We concede it. The power to require an *unnecessary* and wholly useless expenditure of money, in the construction and maintenance of stations where they are not needed, is denied. That is the whole case.

Respectfully submitted,

ALBERT E. CLARKE,
Attorney for Plaintiff in Error.

FILE COPY. 122

Supreme Court of the United States.

OCTOBER TERM, A.

Office Supreme Court U.S.
FILED
DEC 17 1903
JAMES H. McKENNEY,
Clerk.

NO. 138.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

Against

THE STATE OF MINNESOTA EX REL. THE RAILROAD & WAREHOUSE COMMISSION, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF MINNESOTA.

Brief For Defendant in Error.

W. B. DOUGLAS, Attorney General,
HOWARD H. DUNN and LAFAYETTE FRENCH,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

NO. 138.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

Against

THE STATE OF MINNESOTA EX REL. THE RAILROAD & WAREHOUSE COMMISSION, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF MINNESOTA.

Brief For Defendant in Error.

STATEMENT OF THE CASE.

This cause comes to this court by writ of error to the Supreme Court of Minnesota to review the judgment of that court affirming the judgment of the District Court of Freeborn County, directing the plaintiff in error to build and maintain a station house on its line of road at the Village of Emmons and County of Freeborn and State of Minnesota.

A petition signed by a large number of the citizens of the Village of Emmons was presented to the Railroad & Warehouse Commission to require the plaintiff in error to build and maintain a station house on its line of railroad at that place, for the accommodation of the public. The commission fixed a time and place for the hearing of the respective parties, and after such hearing the commission made an order requiring the plaintiff in error to build and maintain such station house.

The commission found that the Village of Emmons is a municipal corporation, duly incorporated and organized under the laws of the State of Minnesota; that said village is situated on the line of the Minneapolis & St. Louis Railroad, that being the only railroad reaching said village; that said railroad had no station facilities whatever at said village; that the annual business furnished said railroad from said village is more than $12,000; that it is necessary, for the accommodation of the citizens of the village and vicinity and the patrons of the road, and public necessity reasonably requires that said railroad company should build and maintain a depot thereat for the accommodation of the patrons of said road; that there is a suitable location for a station house upon the present right-of-way of said railroad company, at the point and upon the property designated in the order.

Transcript of Record, pages 11-12.

The plaintiff in error refusing to comply with this order, this proceeding was instituted to compel compliance therewith.

Upon a hearing in the district court for the County of Freeborn, the district court sustained the order made by the commission and ordering a peremptory writ of mandamus as prayed for, commanding the plaintiff in error to forthwith comply with such order.

Transcript of Record, pages 65-68.

I.

THE WRIT OF ERROR SHOULD BE DISMISSED FOR WANT OF JURISDICTION, AS NO FEDERAL QUESTION IS NECESSARILY INVOLVED IN THE JUDGMENT OF THE COURT BELOW, OR IF THERE IS A FEDERAL QUESTION INVOLVED IN THE JUDGMENT THE DECISION OF THE COURT BELOW IS SO CLEARLY RIGHT THAT THE WRIT OF ERROR SHOULD BE DISMISSED OR THE JUDGMENT AFFIRMED.

(I) NO FEDERAL QUESTION IS NECESSARILY INVOLVED IN THE JUDGMENT OF THE COURT BELOW.

The decision of the supreme court of Minnesota was simply to the effect:

(a) That the commision have the power to order the erection and maintenance of depots where public necessity or convenience reasonably requires it to be done, under Chap. 6, Sec. 388 Genl. Stat. of 1894, following its former decision, (76 Minn. 469).

(b) The General Laws of 1901, Chapter 270, which in express terms requires railroad companies to build and maintain depots or station houses in all villages through which their road may pass, is not open to the objection that it is not within

the legislative power to enact such law. And that by virtue of this act all incorporated villages within the state, located on railway lands are *prima facie* entitled to depots; that the change wrought by this statute simply effects or shifts the burden of proof from the municipality to the railway company, and

(c) That the plaintiff in error did not overcome the *prima facie* case arising by virtue of the statute, and for these reasons affirmed the judgment of the court below.

The construction of this statute by the supreme court of Minnesota could not deprive the railroad company proceeded against of its property without due process of law; nor did its construction raise a federal question.

Phoenix Ins. Co. vs. Gardner 11 Wall. 204.

The construction given to a statute of a state, by the highest judicial tribunal of such state, is regarded as a part of the statute and is binding upon the courts of the United States as to the proper construction of a statute, and as to what should be regarded as among its terms no federal question can arise.

Morley vs. Lake Shore Ry. Co. 146 U. S. 162.

The plaintiff in error has no interest to assert that General Laws of 1901, Chapeer 270, is unconstitutional because it might be construed so as to cause it to violate the constitution. Its right is limited solely to the inquiry whether in the case which it presents, the effect of applying the statute is to deprive it of its constitutional rights.

Castello vs. Mc. Connico, 168 U. S. 674.

As the decision of the supreme court of Minnesota was upon a question not of a federal character, and one broad enough to sustain the judgment, the writ of error should be dismissed.

Miller's Exec. vs. Schwan, 150 U. S. 132.

Morrow vs. Brinkley, 129 U. S. 178.
Hall vs. Akers, 132 U. S. 554.
New Orleans Water Works vs. La. 185 U. S. 336.
Ry. Co. vs. Fitzgerald 136 U. S. 556
Cal. Powder Works vs. Davis 151 U. S. 389.

The holding of the supreme court of Minnesota, that upon all of the evidence before it, the plaintiff in error did not overcome the *prima facie* case arising by virtue of the statute, does not present a federal question and this court will not re-examine the evidence to ascertain whether the evidence justified this finding of the court below.

Eagen vs. Hart, 165 U. S. 188.
Eustis vs. Bolles, 150 U. S. 361.
Beatty vs. Benton, 135 U. S. 244.
Cal. Powder Works vs. Davis, 151 U. S. 389.

(2) *IF THERE IS A FEDERAL QUESTION INVOLVED IN THE JUDGMENT THE DECISION OF THE COURT BELOW IS SO CLEARLY RIGHT THAT THE WRIT OF ERROR SHOULD BE DISMISSED OR THE JUDGMENT AFFIRMED.*

N. Y. & N. E. R. R. Co. vs. Bristol, 151 U. S. 556.
N. Y. & N. E. R. R. Co. vs. Woodruff, 153 U. S. 689.
Chicago, etc. Ry. Co. vs. Neb. 170 U. S. 74.

But if this court shall be of the opinion that it has jurisdiction and that our contention is not well taken in this regard, we submit the following argument in support of the judgment which is sought to be reviewed in this court.

ARGUMENT.

II.

SUBJECT TO THE AUTHORITY OF CONGRESS WITHIN THE SPHERE OF ITS RIGHTFUL POWERS, AND SUBJECT TO ANY RESTRICTION IMPOSED BY THE CONSTITUTION, THE LEGISLATURE OF EACH STATE POSSESSES FULL POWER TO ENACT POLICE REGULATIONS OF RAILWAYS.

The reason why railroad companies may be subjected to this kind of police regulation is very clearly and cogently stated by Mr. Chief Justice Fuller, in N. Y. & N. E. Ry. Co. vs. Bristol, 151 U. S. 556-571, in the following language:

"The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligations of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that, in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States."

In Gladson vs. Minnesota, 166 U. S. 427, this court in passing upon the validity of the statute of the State of Minnesota requiring every railroad corporation to stop all regular trains

running wholly within the state at its stations at all county seats long enough to take on and discharge passengers with safety, Mr. Justice Gray, writing the opinion of the court says:

"A railroad corporation created by a state is for all purposes of local government a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other states, the state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of congress exerted upon the same subject, that they can be required to give way to the paramount authority of the constitution of the United States."

And in Charlotte etc. R. R. Co. vs. Gibbes, 142 U. S. 386, this court in speaking of the state regulations of railroad companies, through the agency of commissioners, say:

"That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charge and unjust discrimination. It may embrace the general supervision of the operation of their road, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion."

In Wis. etc. R. R. Co. vs. Jacobson, 179 U. S. 287-296, the court say:

"If power were granted by the legislature and it amounted in the particular case simply to a fair, reasonable and appropri-

ate regulation of the business of the corporation when considered with regard to the interest both of the company and of the public, the legislation would be valid and would furnish therefore ample authority for the courts to enforce it."

The General Laws of Minnesota of 1894, Chapter 6, creating the Railroad & Warehouse Commission, and defining their powers and duties, provide:

"Section 388. (a). That the commission hereby created shall have authority to inquire into the management of the business of all common carriers, subject to the provisions of this act. * * * * * *

And whenever, in the judgment of the commission, it shall appear that any common carrier fails, in any respect or particular, to comply with the laws of this state, or whenever, in their judgment, any repairs are necessary upon its railroads, or any addition to or change in its station or station-houses necessary, or any change in the mode of operating its roads or conducting its business is reasonable or expedient in order to promote the security, convenience and accommodation of the public, said commission shall inform said railroad company, by a notice thereof in writing, to be served as a summons in civil actions is required to be served by the statutes of this state in actions against corporations, etc. * * * * * * And if such common carriers shall neglect or refuse to comply with such order, then the commission may, in its discretion, cause suits or proceedings to be instituted to enforce its orders, as provided in this act."

Chapter 270, General Laws of Minnesota, 1901, provides:

Section 1. "That all railroads, corporations or companies operating any railroads in this state, shall within a reasonable time after the passage and approval of this act provide at all villages and boroughs on their respective roads, depots, with suitable waiting rooms, for the protection and accommodation of all passengers patronizing such roads, and a freight room for the storage and protection of freight; that all villages of less than one thousand (1000) inhabitants, shall have at least one (1) waiting room, and waiting rooms in all cases when necessary be constructed of such larger szie as to accommodate all passengers patronizing such railroad at any station. And when the annual business of such railroad company at any such station amounts to eight thousand ($8,000) dollars, or more, based upon the outgoing and in-coming freight and passenger traffic, then such railroad company shall keep an agent at said depot during the busi-

ness hours of each business day during the entire year; except stations where receipts from out-going and in-coming freight and passenger traffic for any consecutive three months shall not amount to fifteen hundred ($1,500) dollars.

PROVIDED, That the railroad and warehouse commission may authorize the withdrawal of such agent at depots where the business is periodical during such time as there is no business at any such station."

The Supreme Court of Minnesota has held that there is no doubt of the power of the commissioners under the general railroad and warehouse commission act to require railroad companies to provide suitable passenger waiting rooms and depots, at any place incorporated or unincorporated, where the public necessity or convenience reasonably requires it to be done.

State ex rel. R. & W. Com. vs. M. & St. L. R. R. Co., 76 Minn., 469.

And under a similar statute in this regard the Supreme Court of South Dakota, held that the railroad commissioners of that state have authority to require a railroad to construct a suitable station house at a regular station used by it for the receipt and discharge of passengers and freight, where the only existing accommodation is a platform and sidetrack, and there is a public necessity for such building.

State vs. Chicago, etc., R. R. Co., 12 S. Dak., 305.

In many jurisdictions statutory regulations as to the establishment and erection of depots at proper places along the route of the road, have been sustained as a proper exercise of the police power.

Commonwealth vs. Eastern R. R. Co, 103 Mass. 254.
R. R. Commissioners vs. Portland etc. R. R. Co. 63 Me. 269.
State vs. New Haven R. R. Co. 37 Conn. 153.
State vs. Wabash etc R. R. Co. 83 Mo. 144.
San Antonio etc. R: R. Co. vs. State, 79 Tex 264.
State vs. Kas. City etc. R. R. Co. 32 Fed. Rep. 722. The opinion in this case was written by Mr. Justice Brewer.

The supreme court of Minnesota held that General Laws of 1901, Chapter 270, which requires railroad companies to build and maintain depots or station houses in all villages through which their road may pass, was not open to the objection that it is not within the legislative power to enact such law, and that the change made by this statute simply affects or shifts the burden of proof; that all incorporated villages within the state through which the railroad may pass are *prima facie* entitled to depots, so that a railroad company appearing before the commissioners or delivering its case on appeal to the district court, desires the burden of showing that such a requirement is not called for, and the building and maintenance of a depot in the Village of Emmons is unnecessary and unreasonable.

Transcript of Record, pages 65-66.

The statute as thus construed by the supreme court of Minnesota, does not infringe upon any provision of the federal constitution, or deprive the plaintiff in error of its property without due process of law, or deny to it the equal protection of the laws, or impair the obligation of the charter contract between it and the State of Minnesota.

III.

THE REQUIREMENT OF THE PLAINTIFF IN ERROR TO BUILD AND MAINTAIN A DEPOT OR STATION HOUSE AT THE VILLAGE OF EMMONS WAS A REASONABLE EXERCISE OF THE POWER OF REGULATION IN FAVOR OF THE INTEREST AND FOR THE ACCOMMODATION OF THE PUBLIC.

In the discussion of this proposition we bear in mind that this Court has declared that:

"The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling factor upon the question of its validity. A statute or a regulation provided for therein, is frequently valid, or the reverse ac-

cording as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity or the reverse of legislative action."

Wis., etc. R. R. Co. vs. Jacobson, 179 U. S., 287-301.

The Village of Emmons is duly incorporated under the laws of Minnesota, and located upon the line of the railroad owned and operated by the plaintiff in error. None of its trains stop at Emmons, either to take on or discharge passengers. It has no station facilities. The Village has a population of 246 persons. It contains four grocery stores, two large hardware stores, one drug store, one shoe store, two agricultural implement dealers, one furniture store, one saloon, one printing office, one barber shop, one jewelry store, two restaurants, one hotel, one bank, one lumber yard, two blacksmith shops, two wagon shops, two livery stables and feed barns, one flour mill, one photograph gallery, one harness shop, one grain elevator, two coal yards, one large creamery, one cold storage, and a large public school building. The bank has an average deposit of $60,000; the flour mill has a capacity of 60 barrels per day; there are thirty or thirty-five residences.

Transcript of Record, pages 24–30.

Surrounding the Village of Emmons is a good agricultural country and thickly settled. The people for about eight (8) miles east and three (3) miles south do their trading at this village. The plaintiff in error, on its line of road, maintains a station house at Norman, in Winnebago County, Iowa, which is distant 5045 feet or a little less than one mile from the south end of Main street in the Village of Emmons. In going from Emmons to Norman by the highway, the public travel west on the state line to the county line between Worth and Winnebago Counties; and thence south on the county line. Between Emmons and Norman station is the outlet of the state line lake, and

also the overflow from Bright's lake. The road from Emmons to Norman station extends through a low, marshy country, and for a great portion of the year it is impassable. The authorities of Emmons are unable to expend any of the public funds on this road as it is located in the state of Iowa. This is the only road which the people of Emmons have in reaching Norman station.

The passenger trains on the road of the plaintiff in error, leave Norman station going north 2 o'clock p. m. and 3 o'clock a. m. They arrive from the north at about 2 o'clock p. m. and about 10 o'clock a. m. The station is not kept open in the evening or lighted and one-half of these trains do not stop unless flagged. Persons who desire to take the morning train to go to Albert Lea, the county seat, or to St. Paul or Minneapolis are compelled to take a lantern with them, stand on the platform until the train arrives, without reference to the condition of the weather, and flag the train by swinging the lantern. Upon the arrival of the train at Norman station in the evening, the station is closed, no lights about the station or platform, and passengers living at Emmons or in its vicinity are compelled to travel over this public highway.

The freight receipts in-coming and out-going at Emmons, according to the showing of the plaintiff in error, are in excess of $20,000. As the accounts at Norman station are not kept separate, this showing is based upon the report made by the agent at Norman to the auditor of the company. The receipts of the railway company for passenger business cannot be shown. These shipments apply only to goods and merchandise. Shipments made by parties living in the vicinity of Emmons are not included in this statement. Separate accounts at Emmons and Norman station are not kept separate, but the agent at Norman when he makes his reports enters the shipments as "Emmons" or "Norman." All freight for Emmons, except carload lots, are transported from Norman station to Emmons at a cost of five cents per hundred weight.

That portion of the territory tributary to Emmons, where the people do their marketing and trading at Emmons, extends eight miles west and northwest; five to six miles north; about eight miles east and three miles south. It is a good agricultural country and thickly settled.

The reasons assigned by the plaintiff in error why the inforcement of the judgment would violate its constitutional rights are:

1. *BY REASON OF A ONE PER CENT GRADE AT THE POINT WHERE THE DEPOT IS TO BE LOCATED.*

It is not claimed on the part of the plaintiff in error that it will interfere or prevent the operation of any of its trains, except going north, and then only with maximum freight trains.

The company's spur track at Emmons is located 600 feet from the state line, and on a one per cent grade, and still the company stops its trains, puts on and takes out cars, except maximum trains, and at Norman for about 1000 feet the grade is 9-10, *practically the same as at Emmons*, but it is shown that the policy of good railroading requires grades of this character to be cut down or reduced.

2. *THAT THE CONTEMPLATED CHANGE IN ALIGNMENT OF THE COMPANY'S ROAD WOULD MAKE THE STATION AT EMMONS WORTHLESS.*

Mr. Wheeler, a civil engineer, in the company's employ, states in his testimony that the company is revising its lines, taking out the curvatures and reducing the grades; that the point at Emmons is one of the contemplated changes.

And Mr. Tanner, superintendent of transportation, for the plaintiff in error, said that he had recommended this change to the management, and that it was under serious consideration.

For all that appears the plaintiff in error may or may not make this change in the alignment of their road, and if made at all, it does not appear when it will be made. The company has not ordered the change to be made. What assurance have we that it will ever be made? It is no where stated in the record as a fact that a change has been ordered or directed by the company.

3. *THAT THE PLAINTIFF IN ERROR HAS A STATION AT NORMAN BUILT BEFORE THE EXISTENCE OF EMMONS AND WHICH THE COMPANY IS BOUND TO MAINTAIN THERE BY VIRTUE OF AN AGREEMENT WITH THE PEOPLE OF NORWAY TOWNSHIP.*

At the time of the original construction of the Minneapolis & St. Louis Railroad the people of Norway township, Winnebago County, Iowa, in which township Norman station is located, voted a five per cent tax to aid in the construction of the railroad, upon the condition that a station should be located and maintained within one mile of the northeast corner of Winnebago County.

Transcript of Record, page 38.

CAN A RAILROAD COMPANY, IN CONSIDERATION OF A TAX VOTED TO AID IN ITS CONSTRUCTION, BIND ITSELF TO BUILD A STATION OR DEPOT AT A PARTICULAR POINT WITHOUT REFERENCE TO A CHANGE OF POPULATION OR THE DEMAND OF BUSINESS OR THE ACCOMMODATION OF THE PUBLIC, IN THE MATTER OF TRANSPORTATION AND TRAVEL, AND PLEAD THAT AND ITS CLOSE PROXIMITY AS A JUSTIFICATION FOR NOT BUILDING AND MAINTAINING A DEPOT WHERE PUBLIC NECESSITY REASONABLY REQUIRES ONE TO BE MAINTAINED IN ORDER TO ACCOMMODATE THE PUBLIC IN THE MATTER OF TRANSPORTATION AND TRAVEL.

It is the duty of the railroad company to furnish reasonable

depot facilities. The number and location of the depots so as to constitute reasonable depot facilities vary with the changes and amount of population and business. A contract to leave a certain distance along the line of road destitute of depots is in contravention of public policy.

St. Joseph & Denver R. R. Co. vs. Ryan 11 Kas. 602.

The location of railroad depots has much to do with the accommodation of the wants of the public. And when once established a change of affairs may require a change of location in order to suit public convenience. Railroad companies in order to fulfill one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require.

Marsh vs. Railway Co., 64 Ills. 414.
St L. etc. R. R. Co. vs. Mathers, 71 Ills. 592.

4. *THAT THE NECESSARY EXPENSE IN CONSTRUCTING A DEPOT IS SO LARGE AS TO BE PROHIBITIVE.*

The testimony shows that a station building of the dimensions specified in the order of the commission can be constructed for $1200, the platform for $250, 1200 feet of side track, the same number of feet that they have at Norman, including switches, so as to have it conform with their present track, for $1600, and when completed the company would have the same accommodation as to side track, station room and other facilities as at Norman.

Transcript of Record, pages 50-51.

A railroad chartered and built primarily for the accommodation and in the interest of the public cannot refuse to obey the commands of the legislature when the public interest reasonably require the building of a station house, because the company will

entail an expense of $3000. The statute provides the size, height and dimensions of a station house which is required to be built.

Genl. Stat. 1894, Sec. 2702.
Genl. Stat. 1897, Chap. 94, Sec. 1.
M. L. & T. R. Co. vs. R. R. Con. 109 La. 247.

The commission in their order simply requires the plaintiff in error to construct their station of the size and dimensions which the statute requires shall be built under the circumstances.

IV.

THE LOCATION OF STATIONS FOR RECEIVING AND DELIVERING PASSENGERS AND FREIGHT INVOLVES A COMPREHENSIVE VIEW OF THE INTERESTS OF THE PUBLIC AS WELL AS OF THE RAILROAD COMPANY, AND ITS INTEREST CAN BE BETTER DETERMINED BY AN ADMINISTRATIVE BOARD INTRUSTED BY THE LEGISLATURE WITH THAT DUTY THAN BY THE ORDINARY JUDICIAL TRIBUNAL.

The commission found after a hearing and investigation that it is necessary for the accommodation of the citizens of the Village of Emmons, and vicinity, and the patrons of the road, and that public necessity reasonably requires that the plaintiff in error should build the depot in question; that there is a suitable location for a station house upon the present right-of-way of the plaintiff in error, at the point and upon the property designated in the order.

These findings of fact by the commission are *prima facie* evidence of the matters therein stated.

Genl. Stat. 1894, Sec. 399.

Under the statute every presumption is in favor of the action of the commission, and the burden was upon the plaintiff in error to show that such action was contrary to law.

The supreme court of Minnesota, in speaking of the principles on which the court should proceed to review the acts of the commission, say:

"Ordinarily, on appeal from one tribunal to another the evidence on which the lower tribunal acted is returned, and the decision is reviewed in the light of that evidence. But the commission need not base its decision wholly on any such evidence. It is not a judicial tribunal, but an administrative body, whose powers are somewhat legislative in their character; and, like other administrative or legislative bodies, it acquires a knowledge of the facts, circumstances, and conditions in its own way."

Steenerson vs: G. N. Ry. Co. 69 Minn. 353-376.

Again at page 410, Mr. Justice Mitchell says:

"Courts should be very slow to interfere with the deliberate judgment of the legislature or the legislative commission in the exereise of what is confessedly a legislative or administrative function. To warrant such interference, it should clearly appear that the rates fixed are so grossly inadequate as to be confiscatory, and hence in violation of the constitution."

And in Northern Pac. R. R. Co. vs. Dustin, 142 U. S. 492-499, Mr. Justice Gray uses the following language:

"The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public as well as the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at, or near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards entrusted by the legislature with that duty, than by the ordinary judicial tribunals."

In view of the command of the legislature, the findings of the commission, the physical obstacles that render it inconvenient for the people of Emmons, and its vicinity, to receive reasonable accommodations at Norman Station, can the Court say that by

the enforcement of the judgment in this case, any of the constitutional rights of the plaintiff in error will be thereby invaded? We think not.

We respectfully submit that the writ of error should be dismissed or the judgment affirmed.

W. B. DOUGLAS, Attorney General,
HOWARD H. DUNN and LAFAYETTE FRENCH,
Attorneys for Defendant in Error.

12226

Supreme Court of the United States.

No. 138.—October Term, 1903.

The Minneapolis and St. Louis Railroad Company, Plaintiff in Error, *vs.* The State of Minnesota ex rel. The Railroad and Warehouse Commission.	In error to the Supreme Court of the State of Minnesota.

[February 23, 1904.]

Mr. Justice McKenna delivered the opinion of the Court.

This is a proceeding in mandamus to compel plaintiff in error to build and maintain a station house on the line of its road at the village of Emmons, in compliance with an order of the Railroad and Warehouse Commission of the State of Minnesota.

The order of the commission was made upon petition and upon hearing after due notice to plaintiff in error. The writ was granted by the District Court of Freeborn County, where the proceedings were commenced.

The railroad company in its answer attacks the statute under which the commission acted as follows:

"This respondent says further, that chapter 270, General Laws 1901, approved April 13, 1901, which was enacted by the legislature of said State at its thirty-second session, which arbitrarily requires railroad carriers to provide freight and passenger rooms and depots at all villages and boroughs upon their respective roads, without regard to the necessity therefor and without regard to the location or situation of such village or boroughs, or to existing conditions, is unjust, unreasonable, contrary to public policy and void.

"It denies to the respondent the right to reasonably manage or control its own business; it takes its property without its consent.

"It takes the property of this respondent arbitrarily and unnecessarily, for public use, without just compensation, and is, therefore, violative of the Fifth Amendment to the Constitution of the United States.

"It deprives the respondent of its property without due process of law, and denies it the equal protection of the laws, and thus violates the Fourteenth Amendment to the Constitution to the United States."

The Supreme Court of the State affirmed the judgment of the District Court, the members of the court equally dividing on the facts.

This is the second attempt of the village of Emmons to secure a depot. The first was unsuccessful, (76 Minn. 469,) "wherein the facts are stated," the Supreme Court observed, and it further observed, passing on the case at bar:

"Mr. Associate Justice Lovely having been of counsel for the village in the former proceeding, was disqualified from sitting at the hearing of this appeal, and the cause was necessarily argued and submitted to the four remaining members of the court. We assume that the Laws 1901, chapter 270, which in express terms requires railway companies to build and maintain depots or station houses in all villages through which their roads may pass, is in itself valid legislation, and not open to the objection that it is not within the legislative power to enact such a law. With this assumption no dispute has arisen over a construction of the act, to the effect that all incorporated villages within this State located on railway lines are *prima facie* entitled to depots. The commissioners have the power to order the erection and maintenance of depot buildings unless it is made to appear that such an order would be so unreasonable in its terms as to actually result in depriving the company proceeded against of its property without due process of law. The change made by the statute of 1901 simply affects or shifts the burden of proof, for prior to its enactment the burden was on the municipality to establish the reasonableness and necessity of a depot therein, while now a railway company appearing before the commissioners, or trying its case on appeal to the District Court, bears the burden of showing that such a requirement is not called for, and that the building and maintenance of a depot in the village is unnecessary and unreasonable.

"But while agreeing as to this interpretation of the law, we fail to reach the same conclusion in respect to the facts. We do not question the correctness of the conclusion reached when considering the former appeal. But two members of the court, Mr. Chief Justice Start and Associate Justice Brown, are of the opinion that, from the evidence, it appears that there has since been a substantial growth in the village, a growth which makes an altogether different showing, and that the company did not overcome the *prima facie* case arising by virtue of the statute, and therefore that the judgment appealed from should be affirmed. Associate Justice Collins and Lewis are unable to agree to this. Their conclusion is that the testimony fails to show that there has been a real or substantial change in the village, its needs or necessities, that the situation is practically as it was when the former proceeding was considered that the *prima facie* case made by the village has been wholly overcome by the defendant company.

"With this difference of opinion the judgment appealed from must be and hereby is affirmed."

The defendant in error contends by those observations the court only decided, following its former decision, (76 Minn. 469,) that under chapter 6, section 388, General Statutes of 1894, the commission had the power to order the erection and maintenance of depots where public necessity or convenience reasonably required it to be done, and that the only change made by the act of 1901 was to shift the burden of proof from the municipality to the railroad company, and therefore the court, in deciding that the railroad company had not overcome the *prima facie* case arising from the statute, did not decide a Federal question.

It is difficult to deal with the motion on account of the uncertainty of the contentions of plaintiff in error. In its answer in the District Court it

directly attacks the statute. In this court its contentions are not so sweeping and we are left in doubt by its opening and reply briefs whether the statute as construed by the Supreme Court is objected to or only its application under the facts of the case. However, as the statute was directly attacked in the answer the motion to dismiss is denied, and we will consider whether the grounds of objection to the statute are substantial and sufficient.

(1) The act of 1897 provided as follows:

"That all railroad corporations or companies operating any railroad in this State shall . . . provide at all villages and boroughs on their respective roads, depots with suitable waiting rooms for the protection and accommodation of all passengers patronizing such roads, and a freight room for the storage and protection of freight. . . . Such railroad corporations or companies shall at such depots or stations stop their trains regularly as at other stations, to receive and discharge passengers, and, for at least one-half hour before the arrival, and one-half hour after the arrival, of any passenger train, cause their respective depots or waiting rooms to be open for the reception of passengers; said depots to be kept well lighted and warmed for the space of time aforesaid."

In its first opinion, (76 Minn. 469,) the court held that the word "villages," in the act meant incorporated villages, and that Emmons was not incorporated. The court, however, proceeded further, and said:

"But there is no doubt of the power of the commissioners, under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot and passenger waiting room at any place, incorporated or unincorporated, where public necessity or convenience reasonably requires it to be done. But this power is neither absolute nor arbitrary. The facts must be such, having regard to the interests, not only of the particular locality, but also of the public at large and of the railroad company itself, as to justify the commissioners, in the exercise of a reasonable discretion and judgment, in ordering the railroad company to provide a depot and passenger station at the place in question. Counsel for the relators admit this, the only evidence being the report of the commissioners themselves, we must refer to it to ascertain whether facts therein stated reasonably justified their order requiring the railroad company to provide and maintain a depot and station at Emmons. The statute provides that, 'Upon the trial of said cause [before the court, as in this case, to enforce the order of the commissioners] the findings of fact of said commission as set forth in its report shall be *prima facie* evidence of the matters therein stated.' (G. S. 1894, § 399.)"

The court then reviewed the facts, and decided that the order of the commission establishing a station at Emmons was unreasonable. The act was amended in 1901, and the court in the case at bar has decided, as we have seen, the amendment has only to shifted the burden of proof. In other words, to quote from the opinion of the court, "incorporated villages within this State (Minnesota) located on railway lines are *prima facie* entitled to depots," and at a hearing before the commissioners and in the District

Court the railroad has the burden of showing that the establishment of a depot is unreasonable and unnecessary.

The statute, as thus construed, does not transcend the power of the State, In other words, and meeting exactly the contention of plaintiff in error, the statute does not deny plaintiff in error the right to reasonably manage or control its property or arbitrarily take its property without its consent or without compensation or due process of law. (*Wisconsin &c. R. R. Co.* v. *Jackson*, 179 U. S. 387.) To establish stations at proper places is the first duty of a railroad company. The State can certainly provide for the enforcement of that duty. An incorporated village might be said to be such a place without an express declaration of the statute. To make it *prima facie* so by statute and to impose the burden of meeting the presumption thence arising certainly does not amount to an invasion of the rights of property or an unreasonable control of property. This seems to be conceded in the reply brief of plaintiff in error. Counsel say:

"The power of the State to require the construction and maintenance of stations at proper points is not questioned. We concede it. The power to require an unnecessary and wholly useless expenditure of money, in the construction and maintenance of stations where they are not needed, is denied. That is the whole case."

And stating the decision of the court in 76 Minn. counsel quotes as follows:

"The commissioners have the power to order the erection and maintenance of depot buildings, unless it is made to appear that such an order is so unreasonable in its terms as to actually result in depriving the company proceeded against of its property without due process of law."

And counsel adds: "This is, of necessity, a Federal question."

Whether it is or not, and whether it is so dependent on the facts of the case as not to be open to our review, is the next ground to be considered.

(2) The charge is that the property of plaintiff in error is taken without due process of law, but whether so taken is made to depend upon a question of fact, the requirement of "an unnecessary and wholly usless expenditure of money." It is well established that on error to a State court this court cannot re-examine the evidence, and when the facts are found we are concluded by such finding. (*Egan* v. *Hart*, 165 U. S. 188.) But in the case at bar we are met by the circumstance that the Supreme Court equally divided on the question whether the facts distinguish this case from 76 Minn. The plaintiff in error, therefore, contends that there has been no judgment of the Supreme Court on the facts and they are open to review here. The contention is not tenable. There is no statement of facts by the Supreme Court and its decision, though by a divided court, constituted an affirmance of the finding of the District Court. The finding was as follows:

"That the respondent railroad company has no depot or station house whatever for the accommodation of the public upon its line of railroad at the village of Emmons, and that its line of road is the only railroad reaching such village.

"That there is a suitable location for a depot or station house upon respondent's right of way at the point referred to and described in the order of the board of railroad and warehouse commissioners herein, which order is hereto attached. That it is necessary for the accommodation of the citizens of Emmons and vicinity, and the public at large, and public necessity requires that the respondent railroad company build and maintain a suitable station house at the said village of Emmons for the accommodation of the public transacting business with the respondent at that point."

The finding, like the verdict of a jury, is conclusive in this court. (*Dower* v. *Richards*, 151 U. S. 658.) It follows that the order of the Warehouse Commission was not an unreasonable requirement, and the judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.